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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1671

DALE C. RICHARDSON,

Petitioner,

vs.

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,
AND
LOCAL 7495,
COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Dale C. Richardson petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit entered on February 13, 1976, petition for rehearing denied March 11, 1976, and motion to stay mandate denied March 22, 1976. The mandate issued March 22, 1976

CITATIONS TO OPINIONS BELOW

The February 13, 1976 opinion of the Eighth Circuit Court of Appeals, not yet reported, is printed in Appendix "A" hereto (A1)[1]. The unreported memorandum decision of June 12, 1975, on the plaintiff's application for attorney fees, and the order thereon by the United States District Court for the District of Nebraska, is printed in Appendix "B" (A15). The October 26, 1973 opinion of the Court of Appeals, reported at 486 F.2d 801, is printed in Appendix "C" (A31). The November 16, 1972 opinion of the Court of Appeals, reported at 469 F.2d 333, is printed in Appendix "D (A40)[2]. The February 29, 1972 unreported memorandum and order of the District Court is printed in Appendix "E" (A43). The June 4, 1971 opinion of the Court of Appeals, reported at 443 F.2d 974, is printed in Appendix "F" (A46). The April 25, 1967 opinion of the District Court, reported at 267 F. Supp. 403, is not relevant to the issues here and has thus not been printed.

JURISDICTION

The judgment of the Court of Appeals (Appendix "A") was entered on February 13, 1976. Subsequent to the March 11, 1976 denial of a petition for rehearing, and subsequent to the March 22, 1976 denial of the motion to stay the mandate, the mandate of the Court of Appeals issued on March 22, 1976.

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[1]The letter "A" followed by a number refers to a page number of the appendix.

[2]Certiorari denied 414 U.S. 818 (1973).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and 28 U.S.C. § 1651(a).

QUESTIONS PRESENTED FOR REVIEW

I. Must a district court show the standards by which it was guided in calculating an award of attorney's fees? Must such an award based on bad faith of the opposing party represent the reasonable value of the services rendered? Are the litigation expenses claimed as "between solicitor and client costs" waived if not claimed by challenge to the clerk's taxing of costs? Is it an abuse of discretion to award litigation costs to the party against whom a "bad faith" attorney's fee is awarded?

II. May a district court in a suit under Section 301(a), Taft-Hartley Act, instruct the jury that a union is not responsible for the actions of a member unless the union either authorized or ratified the acts in question?

III. What standards must be followed by a district court in ordering a new trial for an excessive verdict? What is the scope of appellate review of such an order?

STATUTORY PROVISIONS INVOLVED

The suit was brought under Section 301(a), Taft-Hartley Act [29 U.S.C. 185(a)], which provides:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organization, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

Section 301(e), Taft-Hartley Act [29 U.S.C. 185(e)], bears on the liability of a labor union for the acts of its members, and pertains to the issue in Question II. It provides:

> "For the purposes of this section, in determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."

STATEMENT OF THE CASE

This action is based on the harassment and unlawful discharge of the petitioner which followed and resulted from his withdrawal of membership from the defendant unions. The petitioner resided in and worked in the State of Nebraska, which prohibits union shop agreements by law under the authority of Section 14(b), Taft-Hartley Act. The facts are well summarized in footnote 12 of Appendix "F" (A62)–the Court of Appeals decision at 443 F.2d 974.

This action under § 301, Taft-Hartley Act [29 U.S.C. 185(a)], against Western Electric Co. (the employer) and the unions, was one for damages for lost compensation and for mental anguish, and was filed on December 21, 1966. There have been 227 filings in the District Court alone. The basis for suit against the unions was breach of fiduciary duty of fair representation, by invidious discrimination against the petitioner by reason of his nonmembership in the union.

The first trial was to a jury, February 17 - 26, 1969. The trial judge dismissed the mental anguish claim and limited the lost compensation claim to that lost during the seven-month period between discharge and expiration of the collective bargaining agreement. The jury's $20,000 verdict against the employer and the unions was reduced by the trial judge to $1,500, after he had first ordered a new trial, then set aside the order on his own motion. Before the new trial order was set aside, Richardson had unsuccessfully petitioned the Court of Appeals for mandamus to reinstate the verdict.

Petitioner appealed from the $1,500 judgment. The Court of Appeals reversed and remanded (Appendix "F") for a second trial. At that trial, the jury returned a $92,000 verdict for lost compensation, allocated 30% against Western Electric Co. and 70% against the unions. It also returned a $250,000 verdict for mental anguish against the unions only. The Court of Appeals opinion had eliminated the employer as a party to the mental anguish claim. A compromise settlement between the employer and petitioner led to dismissal of the employer from the suit.

The District Court ordered a new trial on the mental

anguish claim, holding the verdict to be excessive and the result of passion or prejudice (Appendix "E"). The unions' attempted appeal from the judgment entered on the lost compensation claim, and petitioner's attempted appeal from the order for new trial, were both dismissed as appeals from nonfinal orders (Appendix "D"). This Court denied Richardson's petition for certiorari [414 U.S. 818 (1973)]. After the District Court re-entered judgment with an express determination of "no just cause for delay," the unions again appealed, and the Court of Appeals affirmed (Appendix "C") the judgment on the lost compensation claim. That judgment has been satisfied. At petitioner's request, without opposition from the unions, the District Court deferred hearing on the attorney fee application until disposition of the second claim.

At the third trial, June 3 - 11, 1974, at which the only issues were those of liability and damages for mental anguish against the unions, the jury returned a defense verdict. After a fee hearing on October 15 and October 19, 1974, the District Court ordered the unions to pay a $10,000 attorney fee to the petitioner (Appendix "B"). The decision was silent on that portion of the fee claim which itemized and requested reimbursement for necessary expenditures in connection with the suit. The claim for fees and expenses is printed in Appendix "G."

On petitioner's appeal from the judgment, including the fee award, and the unions' cross-appeal from the fee award, the Court of Appeals affirmed the judgment and fee order, and denied petitioner's request for rehearing. The Court of Appeals had denied petitioner's pre-third trial request for a writ of mandamus to reinstate the verdict and set aside the

new trial order.

ARGUMENT

I

The Court Of Appeals Erred By Refusing To Require Computation Of The Attorney Fee In Accordance With Requisite Standards, By Refusing To Review The Amount Of The Award, By Holding That Expenses Were Recoverable Only By Challenge To The Clerk's Taxing Of Costs, And By Approving The Award Of Third Trial Costs Against The Petitioner.

Testimony and affidavits at the fee hearing showed an expenditure of 2,245 hours of legal work by three attorneys on behalf of petitioner. An expert witness testified at the fee hearing to his estimate that petitioner's undersigned counsel had expended about 1,400 hours attributable to the lost compensation claim, and testified to his opinion of the reasonable value of that 1,400 hours.

The District Court fee award (A15) was based on a finding of bad faith by the unions in the conduct upon which suit was based. The fee order does not reveal how the court arrived at the $10,000 amount.

The fee order contained no findings or computations such as are required by the cases to be cited hereinafter. The pertinent paragraph (A29) of the order read:

> "Accordingly, in recognition of the importance of this case, the hours of labor reasonably attributable to the result achieved here, the alleged

> business lost by the plaintiff's counsel as a result of his participation in this case [there was no such allegation], the compensation due the plaintiff, and all of the other factors present, particularly the liberal award of damages by the jury to the plaintiff, an order will be entered awarding the sum of Ten Thousand Dollars ($10,000) for legal fees in the prosecution of this case."

The petitioner hammered in the Court of Appeals in his opening appellant brief, his appellee brief, his reply brief, his oral argument, his post-argument letter to the Court of Appeals, and his petition for rehearing on the point that the District Court's abuse of discretion included its failure to show how the fee was computed and its failure to show how requisite standards for fee computation were applied.

The Court of Appeals erroneously found that petitioner "failed to separate the portion of his time spent in the unsuccessful prosecution of his claim on Count II." (A14).

The Court of Appeals decision was completely silent on the computations-and-standards issue. The decision's reference (A14) to the discretion involved in an award of attorney fees was: "The allowance of attorney fees rests with the discretion of the trial court and will not be disturbed absent a showing of an abuse of discretion." Such a holding does not recognize that failure to show the standards followed and the computation of the fee constitutes an abuse of discretion. It does not recognize that the discretion involved is in whether a fee is due and that the amount of the award is reviewable.

The attorney fee and expense claim was contained in an affidavit (Appendix "G") filed with the District Court before the fee hearing. That affidavit contained four and one-half legal size pages (A68) itemizing the work done by counsel. Although the affidavit covered work on both the lost earnings and mental distress claims, it was consciously drawn in a manner which would permit segregation, as between the claims, of work done *after* the lost compensation claim was out of the case.

The unions raised no issue in the District Court of non-allocation as between the two claims. Their briefs did not even hint at such an issue until their appellee brief in the Court of Appeals. The District Court was not concerned over any such fancied nonallocation, stating (A27):

> "Finally, the defendants suggest that even if the plaintiff is entitled to recover his fees relating to his prosecution of Count I, he should not be permitted to recover fees relating to Count II since the defendants ultimately prevailed on that count. However, a party need not prevail on every aspect of his complaint in order to recover his fees. *Reed v. Arlington Hotel Company, Inc.*, 476 F.2d 721 (8th Cir. 1973), *cert. denied,* 414 U.S. 854, 94 S. Ct. 153, 38 L. Ed. 2d 103 (1974). Nor is it always that easy to separate fees relating to two separate counts each arising out of the same basic facts. Consequently, while the defendants' suggestion has a certain appeal, it is not practical in every case."

The District Court fee award gives no clue to how it was computed. Footnote 4 (A28) to the fee award opinion con-

fuses the issue, stating that because of the damages award, "a recovery of attorney's fees is no longer called for," and that a fee shifting based upon a finding of bad faith in a § 301 case is both "compensatory and punitive" in nature. That holding is contrary to the Eighth Circuit holding in *United Steelworkers of America v. Butler Manufacturing Co.*, 439 F.2d 1110 (8th Cir. 1971), that a fee award in a "bad faith" case is compensatory in nature.

One thing is clear from the District Court fee order: the fee was not based on the reasonable value of the legal services rendered. It is also clear that the reason that it was not so based was "the liberal award of damages by the jury to the plaintiff." (A29). The itemized claim for necessary expenditures not recoverable as ordinary costs was in the same affidavit as the claim for fees and begins in Appendix "G" at A74.

The expense claim (A74) was contained in the same affidavit as the time claim and covered six and one-half legal size pages. That expense claim was sufficiently detailed to permit allocation between the two claims, with the help of some estimates on items which pertained to both claims.

The unions again raised no issue in the District Court concerning the expense claim. The expense claim was mentioned by the unions on appeal only in a footnote on page 28 of their appellee brief. The Court of Appeals decision adopted the position taken by the unions in that footnote.

The Court of Appeals adopted (A14) the unions' suggestions of "failure to separate" the time spent on each claim and failure to challenge the taxing of costs without ever having seen the claim. Neither the claim affidavit nor

any copy of it ever left the office of the District Court clerk. The affidavit was not included in the appendix or in any filing with the Court of Appeals.

The District Court awarded third trial costs against the petitioner (A30).

A. The fee.

1. Failure to show fee computation was an abuse of discretion.

The bellwether case with respect to guidelines required for computation of an attorney fee is *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-719 (5th Cir. 1974). The *Johnson* guidelines are: (1) the time and labor required (" . . . they are a necessary ingredient to . . . be considered" [page 717]); (2) the novelty and difficulty of the questions; (3) the skill required to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

The foregoing *Johnson* guidelines are consistent with the American Bar Association's Code of Professional Responsibility, Ethical Consideration 2-18, Disciplinary Rule 2-106.

Johnson also held, at pages 716-717, that the discretion confided to a district judge with respect to fee awards is the discretion to determine whether a fee should be awarded, holding further that a Court of Appeals may review whether the award was in a reasonable amount.

The Eighth Circuit has followed the *Johnson* guidelines in cases other than this one. In *Doe v. Poelker*, 515 F.2d 541, 548 (8th Cir. 1975), 527 F.2d 605, 606-607 (8th Cir. 1976), the Court of Appeals demanded that the District Court follow *Johnson* in its fee computations, remanded the case for such computations, and subsequently approved a computation which followed the *Johnson* guidelines. In a decision by the same author as here, the Eighth Circuit held that " . . . the 'only legitimate starting point' in establishing fees is 'by merely multiplying attorney's hours and typical hourly rates . . . ' " *Grunin v. International House of Pancakes*, 513 F.2d 114, 127 (8th Cir. 1975).

"A logical beginning in valuing an attorney's services is to fix a reasonable hourly rate for his time." *Lindy Bros. Builders v. American R. & R. San. Corp.*, 487 F.2d 161, 167 (3rd Cir. 1973).

"The inquiry begins with a determination of the time devoted to the litigation. This figure in turn is multiplied by an hourly rate." *National Treasury Employees Union v. Nixon*, 521 F.2d 317, 321 (D.C. Cir. 1975).

"The failure to consider such factors [those in *Johnson, supra*] constitutes an abuse of discretion." *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 69-70 (9th Cir. 1975).

"While we are not permitted to substitute our judgment for that of the District Court' . . . we can review

the bases for the decision on fees and revise it if necessary." *Swanson v. American Consumer Industries, Inc.*, 517 F.2d 555, 559 (7th Cir. 1975).

"While the Court below made a passing reference [to *Johnson, supra*] . . . there was scant explication of the Court's application of the guidelines which we took pains to formulate." *Miller v. Mackey International, Inc.*, 515 F.2d 241, 242 (5th Cir. 1975).

"Since the record fails to supply the information necessary to apply the *Lindy* standard, it is clear that the award . . . was inconsistent with the sound exercise of discretion." *Estien v. Christian*, 507 F.2d 61, 65 (3rd Cir. 1975).

" . . . [W]e are convinced that the method whereby the judge computed the award of attorney's fee was so lacking in analysis that it constituted an abuse of discretion." *Waters v. Wisconsin Steel Works of International Harvester Co.*, 502 F.2d 1309, 1322 (7th Cir. 1974).

"[The district court's] failure to follow proper standards in awarding fees . . . [was] inconsistent with the sound exercise of discretion." *City of Detroit v. Grinnell Corporation*, 495 F.2d 448, 473-474 (2d Cir. 1974).

" . . . [A] meaningful review requires a record that elucidates the factors that contributed to the fee decision and upon which it was based. Certainly it is not conducive to an appropriate appellate review where, as here, the reviewing tribunal is completely in the dark as to what the trial judge found concerning the time and labor involved, the rate of compensation, and the aspects he may have deemed of significance. *Evans v. Sheraton Park Hotel*, 503 F.2d 177, 188 (D.C. Cir. 1974).

"Because our review is dependent upon some sort

of record of the basis for the decision below, we vacate the judgment insofar as it relates to the attorney's fee and remand the cause to the district court for findings of fact and conclusions of law as to the amount of any attorney's fee awarded." *Monroe v. Board of Commissioners of City of Jackson, Tennessee*, 505 F.2d 105, 109 (6th Cir. 1974).

"Where a District Court errs as a matter of law by utilizing improper standards or procedures in determining fees, an abuse of discretion occurs . . . . Similarly, clearly erroneous findings of fact require reversal." *Merola v. Atlantic Richfield Company*, 493 F.2d 292, 295 (3rd Cir. 1974).

"His attorneys should not be denied compensation for reasons not apparent on the record." *Green v. Transitron Electric Co.*, 326 F.2d 492, 499 (1st Cir. 1964).

"Where, as in this case, there is nothing in the record to indicate what factors the trial judge deemed important in making an award, there can be no basis for adhering to the rule of discretion." *Ellis v. Flying Tiger Corporation*, 504 F.2d 1004, 1006 (7th Cir. 1972).

2. The fee award must represent the reasonable value of the services rendered.

That the District Court erred in awarding the fee on some basis other than the reasonable value of the services rendered is shown by the holding in *Tillman v. Wheaton-Haven Recreation Assn., Inc.*, 517 F.2d 1141, 1148 (4th Cir. 1975) that " . . . when an allowance of attorneys' fees was justified, it should be measured by the reasonable value of the lawyer's services."

"The fee should represent the reasonable value of the services rendered . . . . " *Wilderness Society v. Morton*, 495 F.2d 1026, 1036 (D.C. Cir. 1974).

A requirement of a reasonable attorney's fee was held "to require the district court to award a fee that would approximate the customary fee in the community for similar work." *Singer v. Mahoning County Board of Mental Retardation*, 519 F.2d 748, 749 (6th Cir. 1975).

In the decisions of both the District Court and the Court of Appeals is an implicit assumption that the attorney fee awarded was not required to be measured by the reasonable value of the services rendered. Also, the Court of Appeals reference (A14) to the plaintiff's failure to separate the time "spent in prosecuting his claim on Count II" is without justification in the record. That reference completely ignores the itemization in the fee affidavit, as well as the testimony of the plaintiff's expert witness, a respected and well-known trial attorney, that undersigned counsel had spent 1,400 hours on Count I, the lost-compensation count. The time spent on that count could only have been established by estimate. An unbiased estimate was in evidence and was called to the attention of the Court of Appeals. That Court in seeking a basis to affirm the District Court chose one neither relied upon by the District Court nor supported by the evidence.

Undersigned counsel neither demanded nor applied for a $168,375 fee. He testified to the number of hours expended and his opinion of the reasonable hourly value of each hour. Multiplication of those two factors produces $168,375. If the $250,000 verdict had been reinstated, such a fee would have been justified. Absent its reinstatement, a fee of $168,375 was not expected.

3. Recovery of compensatory damages and payment of a contingent fee from the award does not justify awarding a fee smaller than the reasonable value of the attorney's services.

The District Court fee decision, as has been mentioned, relied on "the liberal award of damages by the jury" (A28, note 4; A29) to justify a small fee. The Court of Appeals took a related but different approach, apparently justifying the size of the fee by reason of the "[s]izeable attorney fees . . . collected by plaintiff's attorney . . . on a contingent fee basis" (A14, note 11). Such positions of the District Court and the Court of Appeals reflect a misconception of the nature of fee awards. Actually, a larger recovery should have justified a larger fee; a larger contingent fee collected by plaintiff's attorney should justify a larger fee award in order to make plaintiff whole, assuming the contingent fee to have been a reasonable one. The fee paid here was 45% of the approximate $92,000 collected. The fee agreement had started at 33-1/3% after one trial and had progressively increased for additional work to a ceiling figure of 45%.

It must be remembered that the $92,000 award represented compensation that the jury found that the petitioner had lost by the unlawful discharge procured by the unions. The unions should pay an absolute minimum of $40,000, the approximate contingent fee which was paid, so as to make the petitioner whole. Although undersigned counsel has a contingent interest in any fee award, the larger portion of the award will go to petitioner to reimburse him in part for the contingent fee which he has paid.

" . . . the ultimate purpose behind any recovery in such a case, making the employee whole . . . , suggests that the employee may need some financial assistance to press his claim and, if successful, should retain a substantial portion of the jury's 'lost earnings' award for himself. Finally, the cost of attorney's fees is an injury to the employee directly attributable to and necessitated by the failure of the union and/or the employer to utilize . . . grievance procedures . . . without resort to the courts."

De Arroyo v. Sindicato de Trabajadores Packing, AFL-CIO, 425 F.2d 281, 293, note 17 (1st Cir. 1970).

"Adequate compensation is necessary, however, to enable an attorney to serve his client effectively, and to preserve the independence of the profession."

Johnson v. Georgia Highway Express, Inc., supra, 488 F.2d 714, 719-720 (5th Cir. 1974).

It is permissible to include in a fee award compensation for services rendered solely to obtain an allowance of fees. *Rosenfeld v. Southern Pacific Co.*, 519 F.2d 527, 530 (9th Cir. 1975).

B. The expense claim.

1. Denial of expense award.

The unions raised no issue in the District Court on the expense claim, and the District Court was completely silent on that claim. The unions' only mention of the expense claim on appeal was in a footnote in its appellee brief contending that the claim was waived by failure to challenge the clerk's taxing of costs. The net claim presented to the District Court was $6,616.91. The Court of Appeals adopted the unions' position that the claim was waived by failure to challenge the taxing of costs (A13, note 10).

It should be noted here that $1,966.52 has been taxed as costs and collected by petitioner, and that the expenses now claimed are not of the type with which Rule 54(d) deals. By its erroneous position, the Court of Appeals removes expenses from the category of "costs as between solicitor and client" and requires that such expenses be claimed at a different time and in a different fashion than the attorney fees. There is no legal requirement nor custom nor even any authority which requires such expenses to be claimed by challenging the clerk's taxing of costs. Rather, the custom is and has been that expenses are claimed and awarded along with the attorney fees, since both are costs "as between solicitor and client." The Court of Appeals took an unanswerable contention and answered it with a new rule which has never been applied before in any federal court.

"As we stated in *Sprague v. Ticonic National Bank*, . . . , allowance of counsel fees and other expenses entailed by litigation, but not included in the ordinary taxable costs regulated by statute, is 'part of the historic equity jurisdiction of the federal courts.' " *Vaughan v. Atkinson*, 369 U.S. 527, 530 (1962).

This Court in *Sprague v. Ticonic National Bank, supra*,

307 U.S. 161 (1939), noted (footnote 2, page 166) that allowance of costs "as between solicitor and client" had been held within the authority of the federal courts, and also noted at pages 165-166 that costs "as between solicitor and client" included "as much of the entire expenses of the litigation of one of the parties as fair justice to the other party will permit."

"Court costs not subsumed under federal statutory provisions normally granting such costs against the adverse party . . . are to be included in the concept of attorney's fees." *Fairley v. Patterson,* 493 F.2d 598, 606, n. 11 (5th Cir. 1974).

" . . . [T]hey [courts of equity] have awarded litigation expenses, including reasonable attorneys' fees, to the prevailing party." *McClure v. Born Chemical Co.,* 292 F.2d 824, 835 (3rd Cir. 1961).

"In *Trustees v. Greenough,* 105 U.S. 527, 26 L. Ed. 1157 (1881), an order awarding a plaintiff counsel fees and expenses . . . was held to be 'a final decree,' because ' . . . the inquiry was a collateral one, having distinct and independent character . . . ' ." *Cinerama, Inc. v. Sweet Music, S.A.,* 482 F.2d 66, 70, n. 2 (2d Cir. 1973).

Kiser v. Huge, 517 F.2d 1237, 1253 (D.C. Cir. 1974), dealt with and affirmed a District Court award of both expenses and attorney fees.

Kerr v. Screen Extras Guild, Inc., supra, 526 F.2d 67, 69-70 (9th Cir. 1975), involved a remand to determine whether Kerr was "entitled to recover litigation expenses, including reasonable attorney's fees."

"In their petitions . . . [for] attorneys' fees . . . plaintiff's attorneys . . . [included a request for] reimbursement for out-of-pocket expenses of $4,595.11, not covered by the earlier award of taxable costs . . . . [The District Court awarded the claimed expenses and there was no appeal from that portion of the award]." *Swanson v. American Consumer Industries, Inc., supra,* 517 F.2d 555, 561 (7th Cir. 1975).

"Moreover, the Court appears to have ignored the application for costs in the amount of $3,941.57." *Miller v. Mackey International, Inc., supra,* 515 F.2d 241, 242, n. 1 (5th Cir. 1975).

Some of the Court of Appeals errors are not apparent from the face of the decision. Its erroneous position, however, in its footnote 10 (A13) creates a new procedure for claiming expenses in "solicitor and client costs," thus splitting the expense and fee claims, and demanding that expenses be claimed by challenge to the clerk's taxing of costs–a taxing which frequently occurs long before the expenditures are complete. This requirement puts the Eighth Circuit in conflict with all other circuits which have dealt with the matter. Apart from the split in the circuits thereby created, such an odd and unusual and unnecessary requirement should be dealt with by this Court in the exercise of its supervisory powers.

No case has been found where recovery of some sizeable fee or expense to which a party may be entitled has been completely barred because of some failure to meet some time schedule during the normal course of the litigation. Petitioner's counsel vigorously rejects any contention that he was required to claim expenses by challenging the clerk's taxing of costs. However, if he was so required, it would have been appropriate to afford him another oppor-

tunity to obtain the relief to which he was entitled, rather than dismissing such a sizeable claim on a basis not theretofore found in any case, statute, or rule, especially since there was no showing of any prejudice to the unions or the court.

" . . . [T]he time required [for filing a motion for review of a cost bill] is not jurisdictional and the court may entertain a tardy motion for review." 6 Moore's Federal Practice, 54.77[9], page 1755.

" . . . [A] petition for reimbursement of costs as between solicitor and client may be treated as a proceeding supplementary to the main proceeding that created the fund." 6 Moore's Federal Practice, 54.77[9], page 1756.

C. The award of costs against petitioner.

In a case which has gone on as long as this one, it is easy to forget how it was that the third trial came about. The District Court in the first trial struck the mental anguish claim from the complaint. In an excellent opinion (A46), holding that damages for mental anguish could be recoverable in a § 301 case, the Eighth Circuit authorized the plaintiff to amend his complaint to state a claim for damages for mental anguish against the unions.

The complaint was amended, the second trial was had, and the jury made an award of $250,000 damages on the claim. The District Court ordered a new trial. The plaintiff-petitioner tried an appeal and a petition for mandamus and a petition for certiorari, in efforts to avoid the third trial, but was unsuccessful. The only settlement offer ever made by the unions was one for $5,000 made before the second

trial. Thus, petitioner had no choice but to go to trial for a third time.

Given the outcome of that trial and the deficiencies in it which were shown to the Court of Appeals, not to have taken an appeal would have been unthinkable to any lawyer. Yet, the Court of Appeals has displayed some impatience with the case. The first words spoken were as petitioner's counsel stood to open his argument, when the Court said to him, "I'm wondering whether there will ever be an end to this litigation."

It was an abuse of discretion to award third trial costs against the plaintiff. The first jury, the second jury, the District Court, and the Court of Appeals all found bad faith on the part of the unions, a breach of the unions' fiduciary duty of fair representation, by procuring the plaintiff's discharge. When a plaintiff such as here has been literally forced to litigate in an effort to obtain his rights, should the "bad faith" unions recover their costs against him?

"The purpose of the award [of fees and costs], the Court emphasized, was to encourage people to seek judicial redress of unlawful discrimination." *Tillman v. Wheaton-Haven Recreation Assn., Inc., supra,* 517 F.2d 1141, 1148 (4th Cir. 1975).

" . . . [T]o bar allowance of attorneys' fees . . . would deter private suits challenging suspect interpretations of Title VII." *Rosenfeld v. Southern Pacific Company, supra,* 519 F.2d 527, 529-530 (9th Cir. 1975).

Small coal operators who prevailed on only one of their two claims against the United Mine Workers and some large coal operators were the prevailing parties and were entitled to their costs. *Lewis v. Pennington,* 400 F.2d 806, 820 (6th

Cir. 1968).

It seems incongruous and contrary to the equitable principles which underlie fee awards to first split up the plaintiff's claims, then to award him an attorney fee based on the bad faith of his opponents, then to award third trial costs against him to his "bad faith" opponents.

It was within the District Court's discretion to order each party to bear its own costs or even to find that petitioner was the prevailing party in the action as such and award him costs. In any event, the Court of Appeals erred in approving the District Court's abuse of discretion in ordering petitioner to pay the unions' third trial costs.

II

The Court Of Appeals Erred By Approving A Jury Instruction That Acts Of Members Did Not Bind The Unions Without Authorization Or Ratification.

A jury instruction (the entire charge to the jury is printed in Appendix "H") submitted by the unions was given to the jury by the District Court (A92):

> "The members of the Defendant Local Union are not agents of the Defendant Local Union. The actions of an individual member of the Defendant Local Union do not bind the Defendant Local Union unless the Defendant Local Union either authorized or ratified the acts in question."

Such an instruction was diametrically opposed to § 301(e) [29 U.S.C. 185(e)], a subsection of the section under which suit was brought. That subsection provides:

> "For the purposes of this section, in determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."

Petitioner's counsel specifically excepted to the instruction (A99).

At this point, a brief factual summary may be in order. The facts shown at all three trials were substantially the same, and are well-summarized by the Court of Appeals in footnote 12 (A62) of its decision at 443 F.2d 974 (Appendix "F").

After withdrawing from the union because of inability to get an accounting of the Local's expenditure of some funds, petitioner and two other employees were subjected daily to multiple mass demonstrations by union members, stewards and officers. They were cursed, threatened, harassed, and tormented daily for almost seven months, in an attempt to get them to strike one of their tormentors so that the Company could fire them. Company officials turned their backs or watched with no attempt to stop the misconduct.

Richardson's wife was called a whore, a steward cleared his throat and spat a gob of phlegm into Richardson's face, Richardson was pelted from behind with nuts and bolts and other thrown objects while sitting at his workbench, his work was sabotaged, his car was blocked in the Company parking lot, and he was burned with a lighted cigarette.

The president of the defendant Local, one Harllee, was one of the ringleaders. Minutes of Local meetings, some of which were altered between trials, showed President Harllee admonishing the members that the violence must stop. At

the same time, a column written by President Harllee–published in a publication put out by the Local–condemned the three nonmembers as leeches, inviting contributions to buy them a one-way ticket to Hell.

After seven months of unsuccessful harassment, the unions "set up" the petitioner and the Company fired him. Officers of the Local on more than one occasion demanded of Company officials that petitioner be fired. The International sent a representative to a Local meeting where the topic of discussion was the penalty to be imposed upon those members not participating in a "wildcat" strike, a "spontaneous" protest of a suspension imposed on a member for tormenting petitioner. All union members, officers, and stewards at work that day, except one, participated in the strike.

No union or Company witness in any of the trials denied the basic facts of the harassment. The only defense raised in each trial was that the harassment was by individuals and was not the work of the unions. In oral argument before the Court of Appeals, in response to the Court's question, counsel for both sides agreed that the third trial verdict hinged on agency.

Petitioner pointed out other deficiencies in the instructions to the Court of Appeals, but he relies here on only one, the giving of the instruction in direct conflict with § 301(e). The Court of Appeals dismissed petitioner's contentions concerning the instructions in a single paragraph (A9):

> "Plaintiff next complains that certain agency instructions were erroneous. The Court's instructions with respect to the unions' responsibility for the conduct of their officers, stewards,

> and members were thorough, and in conformance with the ordinary doctrines of agency which were applicable. *Gibbs, supra,* 383 U.S. at 736; *Wagner Electric Corp. v. Local 1104, Int'l. Union of Radio and Machine Workers,* 496 F.2d 954 (8th Cir. 1974). Plaintiff's objections failed to take into consideration the instructions as a whole. We are satisfied from our examination of the instructions that no error was committed therein."

It is incomprehensible how the Court of Appeals could say that the instruction complained of was "in conformance with the ordinary doctrines of agency," and that it did not constitute error.

United Mine Workers v. Gibbs, 383 U.S. 715 (1966), cited by the Court of Appeals, deals with § 6, Norris-LaGuardia Act [29 U.S.C. § 106]. That section provides:

> "No officer or member of any association or organization participating or interested in a labor dispute, shall be held responsible or liable in any Court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or ratification of such acts after actual knowledge thereof."

The *Gibbs* decision not only does not support the Court of Appeals decision, it refutes it. *Gibbs* refers to the adoption of the Labor-Management Relations Act and to the provisions of § 301(e) as requiring that the responsibility of a union for the acts of its members and officers be measured by reference to ordinary doctrines of agency "rather than the more stringent

standards of § 6.

The other case cited by the Court of Appeals in support of its holding on the instructions was its own *Wagner Electric Corp. v. Local 1104, Int'l. Union of Radio and Machine Workers,* 496 F.2d 954 (8th Cir. 1974). Petitioner is in wholehearted agreement with the holding of that case that (page 956) "a union is responsible for the actions of its officers and members according to the ordinary doctrines of agency." The case gives no support whatsoever to a holding that the "authorized or ratified" instruction was in conformance with the ordinary doctrines of agency.

"*Vulcan* reaffirmed the principle that no *actual* authority of agents is required for union responsibility as long as they are acting within the scope of their apparent authority." *United States Steel Corp. v. United Mine Workers of America,* 519 F.2d 1249, 1253 (5th Cir. 1975).

After quoting § 301(e), *Vulcan Materials Co. v. United Steelworkers of America,* 430 F.2d 446, 457 (5th Cir. 1970), states: "In other words, the act of a union agent committed within the scope of his general authority is binding upon the union regardless of whether it was specifically authorized or ratified."

"The jury was properly instructed that the Unions were responsible for the acts of their representatives only if the latter were engaged within the scope of their employment or authority, but that actual authorization of specific acts was unnecessary. 29 U.S.C.A. § 185(e)." *Lewis v. Benedict Coal Corporation,* 259 F.2d 346, 352 (6th Cir. 1958).

The jury received an instruction which was a gross misstatement of the applicable law of agency. Even the sentence

commencing the paragraph was prejudicially erroneous. It stated flatly:

> "The members of the Defendant Local Union are not agents of the Defendant Local Union."

How could a jury following that instruction possibly have returned a plaintiff's verdict based on the acts of members of the defendant Local? That sentence alone was the equivalent of a directed verdict on the non-agency of the members.

The errors were not minor ones. They dealt with the gravamen of the issue on which the verdict hinged. The "authorized or ratified" portion was diametrically opposed to the statute.

"Error in a specific instruction is not cured by general statements which set out the respective contentions . . . . Erroneous instructions in a jury trial are presumptively injurious and are grounds for reversal unless it affirmatively appears on the record that the error was harmless." *Northern Pacific Railway v. Herman,* 478 F.2d 1167, 1171 (9th Cir. 1973).

" . . . [I]t is well settled that a reversal will be directed unless it appears beyond doubt that the error complained of did not and could not have prejudiced the rights of the party." *Vicksburg & Meridian Railroad Co. v. O'Brien,* 119 U.S. 99, 103 (1886).

"Since it does not affirmatively appear that the confusion in the minds of the jury which would naturally flow from the error in the charge did not in fact prejudice the appellant, the judgment must be reversed . . . . " *Plough v. Baltimore & O. R. Co.,* 172 F.2d 396, 398 (2d Cir. 1949), *cert. denied,* 337 U.S. 940.

"Defendant contends, however, it [an erroneous instruction] was harmless error since other parts of the charge stated the law correctly. We do not agree. The challenged statement was not equivocal or subject to differing interpretation which might be clarified by other portions of the charge. We cannot assume the jury disregarded it. At best, it was likely to leave the jury highly confused, that alone being grounds for reversal. . . . The judge was in fact explaining to the jury precisely what plaintiff had to prove to recover. . . . An erroneous statement of the law at that point cannot be described as harmless." *De Lima v. Trinidad Corporation,* 302 F.2d 585, 587 (2d Cir. 1962).

Where issues of agency and ratification were critical fact issues, and the court gave an erroneous charge to the jury on such issues, it was determined that the error was not harmless and a new trial would be granted. *NMS Industries, Inc. v. Premium Corp. of America, Inc.*, 451 F.2d 542 (5th Cir. 1971).

" . . . [T]he rule that instructions must be considered as a whole is not applied to cure error by conflicting instructions." *Reid's Branson Instructions to Juries,* Vol. I, § 138, page 393 (1960).

"If an erroneous and a correct instruction are given on a material matter, a new trial must be granted. The jury does not know which one is correct and the court does not know which one the jury followed." *Reid's Branson Instructions to Juries,* Vol. I, 1974 Cum. Supp., § 138, page 75.

III

The District Court Abused Its Discretion In Ordering A New Trial, And The Court Of Appeals Erred As To The Permissible Scope Of Review On Such An Order.

A. New trial versus limited new trial or remittitur.

The order for a new trial (A43) specified no misconduct or error, but found that the $250,000 verdict on the mental distress claim was so excessive that it must have been the result of "passion, prejudice, mistake, or some other improper reason" (A44). Although the unions' motion was one for a remittitur, for judgment n.o.v. only upon refusal to remit and for a new trial *only* as an alternative to judgment n.o.v., the District Court ordered a new trial on its own motion. Was not the unions' motion a concession of the validity of the jury's finding of liability?

The decisions of the Eighth Circuit Court of Appeals permit an inference of passion or prejudice to be drawn from the size of the verdict alone. In *Bankers Life & Casualty Company v. Kirtley,* 307 F.2d 418, 426 (8th Cir. 1962), the Court upheld a finding that the verdict was the result of passion or prejudice and stated in so holding that " . . . there is here no affirmative evidence other than the size of the exemplary damage award to indicate passion or prejudice on the part of the jury."

In both *Perry v. Bertsch,* 441 F.2d 939 (8th Cir. 1971) and in *Bankers, supra,* the Eighth Circuit held that a verdict resulting from passion or prejudice does not bar a remittitur and does not necessarily require a new trial. These holdings

are consistent with the widely quoted words of Judge Medina in *Dagnello v. Long Island Railroad Company*, 289 F.2d 797, 802 (2d Cir. 1961):

> "In some cases the very amount of the verdict is said to justify the inference that the verdict was brought about by passion or prejudice, although it seems to us that this is just another way of saying that the verdict is too high."

A complete new trial for an excessive verdict is required only where the verdict resulted from "appeals to passion or prejudice" (*Minneapolis & Sault Ste. Marie Ry. v. Moquin*, 283 U.S. 520, 521 (1931)) and is not required where the passion or prejudice is merely inferred from the size of the verdict alone, as shown by *Bankers* and *Perry*, *supra*. Or is a complete new trial required where the defense post-trial motions do not request it?

Since the District Court found no specific error nor any *appeal* to passion or prejudice, it was free to order a remittitur or a new trial limited to the issue of damages. The Court of Appeals contention that the liability and damages issues were so intertwined as to be inseparable (A7) was adopted from page 23 of the unions' brief and is not supported by logic. Additionally, that union position was first advanced on appeal and not in the District Court.

The unions' contention that damages for mental anguish are arrived at by determining a dollar value for the damage flowing from each act attributable to the unions, and then totaling all of such dollar values, is a sophism unsupported and unsupportable by any citation of authority. Liability and damages are not intertwined in a case involving deliberately induced mental anguish.

A verdict of liability would be required if the jury found that the unions set out to deliberately induce mental anguish in the petitioner and that their efforts even slightly succeeded, irrespective of the dollar value of that damage. The jury would then find the damages attributable to the mental anguish caused by the unions. The evidence showed no other source of mental anguish. If the unions actually believed that the issues of liability and damages were so inextricably intertwined, should they not have submitted and should not the District Court have given instructions to the jury on how to handle such an "adding machine" type of damage calculation and on its complexities? No such instruction was even suggested.

One might think from the "adding machine" contention that the unions defended by presenting evidence about how some specific individuals, and not the unions, were responsible for particular acts. Not so. They simply denied all responsibility for everything. It was a case for the jury of all or nothing.

At the second trial (and at the third trial), the issue of liability was not even a close one. The unions' only defense was one of nonagency. The evidence of agency was overwhelming. The only evidence of nonagency was that of self-serving exculpatory statements by the unions, condemned as ineffective by *Riverton Coal Co. v. United Mine Workers of America*, 453 F.2d 1035, 1042 (6th Cir. 1972), by *Vulcan Materials Co. v. United Steelworkers of America, supra*, 430 F.2d 446, 457 (5th Cir. 1970), and by the Eighth Circuit in *Wagner Electric Corp. v. Local 1104, International Union of Electrical, Radio and Machine Workers, supra*, 496 F.2d 954, 956 (8th Cir. 1974).

A common sense approach to the new trial issue is suggested in the following quotation from *McCormick on Damages*, § 19 at 80-81 (1935):

> "For passion produced by unfair tactics or argument of the successful party, the threat of an unconditional new trial may well be the only effective preventive. In those cases, however, where the facts themselves are so appealing to the sympathies or prejudices of the average man that any jury is likely to render a swollen verdict, then, if the plaintiff's counsel has not by unfair methods whipped up the natural emotions of the jury, to require another trial seems questionable policy. In these cases, an opportunity to reduce the award as an alternative to a new trial might well be offered to the plaintiff wherever the trial judge is satisfied with the justness of the result on the question of liability. To insist that no verdict stand until the jury gives a verdict free of passion and prejudice both in respect to liability and in respect to amount is in these appealing cases to expect an impossibility."

Union counsel made much in the appeals briefs of an alleged "Golden Rule" argument made by petitioner's counsel. However, the trial judge, whose discretion the unions would uphold in every other respect, summarily overruled the objection, not even stopping the argument nor considering it as error.

Since "passion or prejudice" inferred only from the size of the verdict cannot possibly infect the finding of liability, the District Court could have ordered either a remittitur (as

requested by the unions) or a new trial limited to the issue of damages. Its failure to do either constituted an abuse of discretion.

B. The District Court misconstrued the nature of damages flowing from deliberately induced mental distress.

The new trial order displayed a misconception of the nature of the mental distress damages authorized by the 1971 Court of Appeals decision. Out of the several varieties of such mental distress damages, that which was authorized was damages for the mental distress flowing from an intentional wrong. Such damages contain elements not found in mental distress damages which flow from other sources.

The law requires that negligently inflicted mental distress be accompanied by physical injury in order to be compensable. The cases hold that changes in the nervous system which flow from mental distress are physical injuries. *Alcorn v. Anbro Engineering, Inc.*, 2 Cal. 3d 493, 498, 86 Cal. Rptr. 88, 468 P.2d 216 (1970); *Vanoni v. Western Airlines*, 247 Cal. App. 2d 793, 796-797, 56 Cal. Rptr. 115 (1967); *Emden v. Vitz*, 88 Cal. App. 2d 313, 317, 198 P.2d 696 (1948).

Vanoni, supra, held at pages 796-797 that " . . . a shock to the nervous system is an injury to the body rather than to the mind." Headnote 3 in *Vanoni* states: "The allegation in a complaint that plaintiffs suffered severe shock to their nerves and nervous systems *alleges something more than emotional or mental suffering*" (emphasis added).

The mental distress flowing from intentional wrongs is compensable without any necessity of physical injury or injury to the body. *Restatement of the Law of Torts 2d*, § 46, pp. 77-

78; Prosser, *Law of Torts* (4th Ed. 1971) § 12, page 5b.

Even so, the District Court's order for new trial finds (A44, A45) the verdict excessive and unsupported by the evidence because there was no showing that the emotional state caused was of a "permanent and lasting nature," because no "serious psychosomatic illnesses resulted," and because "the trauma caused, if any, was of a temporary duration." As shown by *Alcorn, Vanoni*, and *Emden, supra,* "permanent and lasting" damage to the emotions, "serious psychosomatic illnesses," and "trauma" other than temporary, as demanded by the District Court, are all physical injuries. Borrowing the language of the *Vanoni* headnote, the District Court was demanding "something more than emotional or mental suffering." The "permanent" injury demanded by the District Court was an approach doubtless borrowed from the familiar rules in bodily injury cases that only permanent injuries will support a substantial damage award. The mental distress damages in issue are compensation for the invasion of mental tranquility rather than for their visible long-term effects.

Justice Traynor held in *State Rubbish Collector's Association v. Siliznoff,* 38 Cal. 2d 330, 338, 240 P.2d 282 (1952):

> "Greater proof that mental suffering occurred is found in the conduct designed to bring it about than in the physical injury that may or may not have resulted therefrom."

Since physical injury is not an element of the mental distress damages here in issue, the District Court's new trial order applied an erroneous standard and constituted

an abuse of discretion. Application of the wrong legal standard is an error of law and an abuse of discretion in determining whether to grant a new trial. *Williams v. Nichols,* 266 F.2d 389, 392-393 (4th Cir. 1959).

The petitioner's briefs in the Court of Appeals, as well as his oral argument, dealt with the above issue at some length. His arguments in this respect were dismissed (A7, note 5) as "devoid of merit." This refusal of the Court of Appeals to find an abuse of discretion in the District Court's application of erroneous legal standards as to mental distress was error.

C. Scope of appellate review of new trial order.

> "Review of a ruling on a motion for new trial on the ground of an excessive verdict is similar to the reviewability of the trial court's ruling on a motion for new trial on the ground that the verdict is against the weight of the evidence. But the pressure for review is greater in the area of inadequacy and excessiveness, since only by review of the trial court's ruling on the motion for new trial may the quantum of damages, where the amount is in dispute, be tested in the appellate court." 6A Moore's Federal Practice § 59.08[6], pages 59-170, 171 (2d Ed. 1974).

There is a split between the circuits on the standards for review of an order for new trial for an excessive verdict. There is, in fact, a split within the Eighth Circuit itself. The earlier Eighth Circuit position, and that relied upon

here (A6) was " . . . we shall continue to consider review [of an order granting or denying a new trial for an excessive or inadequate verdict], as we have said before, not routinely and in every case, but only in those rare situations where we are pressed to conclude that there is 'plain injustice' or a 'monstrous' or 'shocking' result." *Solomon Dehydrating Co. v. Guyton,* 294 F.2d 439, 447-448 (8th Cir. 1961).

Then, in 1972, the Eighth Circuit adopted a new and different approach to the problem, which approach was urged by petitioner's briefs as applicable here. The case was *Fireman's Fund Insurance Co. v. Aalco Wrecking Co., Inc.,* 466 F.2d 179, 186-187 (8th Cir. 1972). The decision discussed the scope of review by a Court of Appeals on an order for a new trial.

Some of the pertinent holdings of *Fireman's Fund* are as set forth hereafter: that a grant of a new trial on the basis of instructions or rulings on evidence does not interfere with the jury's role as the trier of fact; that courts may not reweigh the evidence and set aside the verdict just because different inferences could have been drawn or because the judge felt that other results were more reasonable; that the Court of Appeals should exercise a closer degree of scrutiny and supervision to protect the right of jury trial before a new trial is ordered because the trial judge found the verdict contrary to the weight of the evidence; that to justify a new trial, the verdict must be against the *great* weight of the evidence; that otherwise, the jury's role as trier of the facts would be destroyed and the trial judge would be enabled to disregard the jury's verdict at will; that the ultimate issue on a motion for new trial is whether a miscarriage of justice occurred; and that *a district court's new trial decision is*

always subject to review.

Fireman's Fund seemed to herald the advent of desperately needed new rules, different rules than *Solomon's* near-nonreviewability rule. *Fireman's Fund's* "always subject to review" is in direct conflict with *Solomon's* "not routinely and in every case."

As the Court's latest expression on the subject of scope of review, the *Fireman's Fund* decision should have been applied here and petitioner's briefs urged its application. However, one would never learn from the Court of Appeals decision that *Fireman's Fund* had ever been handed down. For the Eighth Circuit to maintain two diametrically opposed rules, and to apply whichever of the two it chooses, is hardly consistent with the rule of law. Such procedure deserves the attention of this Court in the exercise of its supervisory powers.

Leaning in the same direction as *Fireman's Fund,* but still adopting somewhat different standards, is the decision of the District of Columbia Circuit in *Taylor v. Washington Terminal Co.,* 409 F.2d 145, 148-149 (D.C. Cir. 1969), where it was held that review of a new trial order for an excessive verdict requires a Court of Appeals to weigh the trial judge's first-hand observations of the evidence against the different evaluation of the facts by the constitutionally-designated fact-finders, the jury.

The *Taylor* court held that the proper test to be applied by the District Court was whether the award was clearly within the maximum limit of a reasonable range. The Court also held that the verdict there was within such a range and reversed the order for a new trial.

Both *Taylor* and *Fireman's Fund* cited and relied on *Lind v. Schenley Industries, Inc.,* 278 F.2d 79 (3rd Cir. 1960),

cert. denied, 364 U.S. 385 (1960). Other recent cases which follow *Taylor* are: *Brewer v. Uniroyal, Inc.,* 498 F.2d 973, 978 (6th Cir. 1974); *Williams v. Steuart Motor Co.,* 494 F.2d 1074, 1085 (D.C. Cir. 1974); *Manning v. Altec, Inc.,* 488 F.2d 127, 133 (6th Cir. 1973); and *Gorsalitz v. Olin Mathieson Chemical Corp.,* 429 F.2d 1033, 1045-1047 (5th Cir. 1970).

The instant case draws into sharp focus the conflict between the *Solomon* standards, the *Fireman's Fund* standards, and the *Taylor* standards, at least a three-way split, thus offering an excellent vehicle for resolving the split among the circuits (and within the Eighth Circuit) on the standards for review of verdicts alleged to be either excessive or otherwise against the weight of the evidence. This Court is, of course, aware of the tumult in the legal profession over arbitrary grants of new trials at both the state and federal level. The California problem in this respect typifies the common problem in all jurisdictions, and is discussed at length in *Mercer v. Perez,* 68 Cal. 2d 104, 108-124, and in *New Trial Orders; The Erosion of Code of Civil Procedure Section 657,* 9 Santa Clara Lawyer 119 (1968).

The near-absolute discretion which the Eighth Circuit and some other circuits permit the trial judge in new trial orders is nothing more nor less than deprivation of the right to trial by jury.

The application here of *Fireman's Fund* or *Taylor* could have produced a reversal or modification of the order for a new trial. The Court of Appeals, however, followed *Solomon* and refused to review the order. Such refusal was error.

The new trial order contained no findings of fact. It contained no specifications of error nor did it specify any

source for the jury's alleged "passion, prejudice, mistake, or . . . other improper reason." The order contained no review of the evidence, no findings as to what the weight of the evidence showed and, of course, could not and did not contain any showing that the verdict was against the *great* weight of the evidence, or that it represented a miscarriage of justice. It contained no finding of a maximum range or that the verdict was outside a maximum range. The order made no reference to the outrageous union conduct which was calculated to bring about mental anguish in the petitioner. These findings and references were required under the cases which have been discussed, and the condonation by the Court of Appeals of their absence constituted error.

CONCLUSION

The three points made in this petition, the first of which contains several subpoints, form a pattern: the Court of Appeals has refused to enforce the normal rules of law which it applies in other cases. It permitted the District Court to make an arbitrary fee award without any showing of how the figure was reached. It sustained the District Court's complete silence on a substantial claim for expenses, a claim to which the unions raised no defense in the District Court. It ratified an award to the "bad faith" union of its third trial costs against the petitioner. It approved an instruction requiring union authorization or ratification of a member's acts as one in conformance with the ordinary doctrines of agency. It approved the District Court's use of an erroneous measure of damages for mental distress. It avoided any mention of its own later pronouncement on review of new trial

orders, referring instead to an earlier and inferentially-overruled doctrine more favorable to an affirmance of the District Court.

Why has the Court of Appeals gone out of its way to affirm the District Court's multiple arbitrary postiions? When the District Court's dismissal of the mental anguish claim was reversed, it achieved the same result as before by granting a new trial on the second trial verdict and by grossly misinstructing the jury in the third trial. The District Court obviously felt that damages for mental anguish were inappropriate and took steps to see that none were paid. If these arbitrary acts are truly unreachable, then the right to trial by jury is only an illusion.

Did the Court of Appeals decide that the petitioner had "received enough" by way of the damages he had collected on the first claim? Such a position would be hardly consistent with the judicial duty to avoid prejudice by extraneous and irrelevant matters. Juries are not permitted to learn of such dispositions of other claims, and it has never been thought necessary to conceal such from appeals court judges.

Did the Court of Appeals grow impatient with the long-continued litigation? If so, why not terminate it earlier in some of the multiple opportunities extended? The snail's pace of the case was not attributable to the petitioner. The only delay he ever sought was a one-month delay of the second trial, and that request was denied by the District Court in a decision sternly emphasizing the need for speedy dispositions of matters in the federal courts! That decision made no reference to the two-year span between complaint and first trial, or the delay of over thirteen months in entering judgment

after the first trial. From that decision one would not have anticipated that the District Court would take five months to act on the unions' motion for remittitur after the second trial, nor the entry of judgment one year to the day after the third trial verdict. Petitioner once, to no avail, asked the Court of Appeals to assign the case to another District Judge.

Would the weariness of a Court of Appeals with the District Court's overdeliberate pace entitle it to terminate the suit on a basis other than the merits, in disregard of the rights of one of the parties?

Was the unusual position on the expense claim due to some fear that any expense award would go to reimburse the National Right to Work Legal Defense and Education Foundation, Inc.? The District Court, throughout the three trials and the fee hearings, has displayed (on the record) a great deal of interest in the role of that organization in the case. Petitioner's undersigned counsel, on every such occasion, has unhesitantly taken the opportunity to describe the relationship between the petitioner and the Foundation. The petitioner has personally contributed about $1,250 of the total expenditures. The Foundation has made advances since 1967, as requested by undersigned counsel who initiated the first contact, for necessary expenses (no attorney fees) in an amount of over $11,000, and has never in any way attempted to influence the handling of the case.

The petitioner could not have litigated even through the first trial without the Foundation's help. Without the assistance of such an organization, an individual worker is at the mercy of powerful employers and unions, powerless to enforce the federal labor laws purportedly enacted for his benefit.

The petitioner's right to demand the compliance of the unions with their fiduciary duty of fair representation is a civil right. It is not necessary to go as far as *Collum v. Butler*, 288 F. Supp. 918, 919 (N.D. Ill. 1968), *affirmed* 421 F.2d 1257 (7th Cir. 1970), in demanding extra consideration for the verdict (as opposed to the judge's views on a motion for new trial) in a civil rights case. It is only demanded that the petitioner be judged by impartial application of the same rules as in other cases.

Some of the deficiencies in the Court of Appeals decision are couched in language which does not reveal the full import of the ruling. One who had not read the District Court memorandum or the briefs would not realize that the Court of Appeals had approved a failure of the District Court to show how the fee was computed. Nor would a reader of the opinion realize that the Court of Appeals was approving the "authorized or ratified" instruction as one within the ordinary doctrines of agency. If fee computations truly need not be shown, and if the ordinary doctrines of agency have been broadened, the facts should be spelled out in the decision, so that it may stand as precedent for those points.

The decision, however, does contain two visible errors which will undoubtedly be cited as precedents:

(1) Expenses above and beyond and outside the usual taxable costs, which expenses are included in the concept of "costs as between solicitor and client," may be claimed only by challenging the clerk's taxing of costs, and may not be sought in the same claim as the fee.

(2) Where substantial compensatory damages are recovered, where a sizeable contingent fee is paid on

such a recovery, and where "bad faith" requires a fee award, the District Court may award a fee which represents less than the reasonable value of the legal services rendered.

The two points specified above are in conflict with the decisions herein cited of other Courts of Appeals on similar issues. Both points present issues of importance under federal labor law. All of the issues raised in this petition involve a sanctioning by the Court of Appeals of departures so far from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's powers of supervision. All are issues of importance under federal labor law. Some, as specified, involve splits among the circuits.

Because the decision deals with court-awarded fees in an arena where the individual worker is pitted against the union and the employer, it will be of particular interest to lawyers with an opportunity to represent individual workers in such cases. Whereas very few of such cases had been filed before the 1971 decision of the Court of Appeals, a substantial number have been filed and are pending across the nation since that decision was published (Appendix "F," A46).

Affidavits of labor law specialist Donald W. Jones, a Missouri attorney; of the distinguished Jonathan C. Gibson with his wide experience in labor law across the nation and across the years; of the well-known and widely-written Sylvester Petro, professor of labor law at New York University and at Wake Forest–such affidavits having been filed with the District Court–point out the difficulty of the individual worker in finding competent counsel to represent him against his employer and the union.

This Court of Appeals decision will constitute another obstacle in the path of the worker seeking effective representa-

tion. It will stand for the principle that lawyers representing workers against labor unions face rules not applicable in other cases involving the same issues. It will signal that such a lawyer may end up donating a substantial portion of his time. The significance of the decision will not be lost on the legal profession.

WHEREFORE, the petitioner prays that a writ of certiorari issue to review the judgment entered February 13, 1976, petition for rehearing denied March 11, 1976, by the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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STATE OF CALIFORNIA)
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I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, State of California, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 326½ Main Street, Huntington Beach, California 92648, that on MAY 17, 1976, I served the within PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT (DALE C. RICHARDSON vs. COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, LOCAL 7495, COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO) of the following named parties by depositing three copies thereof (to each party), enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said parties at the addresses as follows:

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I declare under penalty of perjury that the foregoing is true and correct.

Executed on MAY 17th 1976, at HUNTINGTON BEACH, CALIFORNIA.

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Supreme Court, U. S.
FILED
MAY 17 1976
E. ROBERT SEAVER, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1671

DALE C. RICHARDSON,

Petitioner,

vs.

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,
AND
LOCAL 7495,
COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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APPENDIX "A"

OPINION OF THE COURT BELOW
FILED: FEBRUARY 13, 1976

In the United States Court of Appeals for the Eighth Circuit.

DALE C. RICHARDSON, Appellant/Cross-Appellee, v. COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, and LOCAL 7495, COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, Appellees/Cross-Appellants.

No. 75-1564
No. 75-1614
No. 75-1645

Appeal from the United States District Court for the District of Nebraska.

Submitted: December 8, 1975.

Before MATTHES, Senior Circuit Judge, STEPHENSON and WEBSTER, Circuit Judges.

STEPHENSON, Circuit Judge.

This is the third appeal arising out of this litigation. The issues raised in plaintiff's appeal and in the cross-appeals by the defendants cannot be placed in proper focus without briefly reviewing the history of the case, which is now here after the third jury trial.

Plaintiff brought this action under section 301(a) of

the Labor Management Relations Act, 1947, 29 U.S.C. § 185(a). He sought damages against a former employer, Western Electric Company, Inc. (Company), and the Communications Workers of America, AFL-CIO (International) and its Local 7495 (Local). The jury found that plaintiff was wrongfully discharged in breach of the collective bargaining agreement by the Company, and that the wrongful discharge was caused by actions of the International and the Local in violation of the nondiscrimination clause of the agreement which prohibited discrimination because of nonmembership in the union. Plaintiff was awarded a verdict in the amount of $20,000 which was reduced by the trial judge[1] to $1500 for the reason that the bargaining agreement could have terminated six and one-half months after plaintiff's discharge. This court reversed and remanded for new trial holding that plaintiff was entitled to damages for loss of earnings extending beyond the collective bargaining agreement, in view of the character of the work involved, the nine years plaintiff had been with the Company, the strong likelihood of his continued employment with the Company, the probability of renewal of the collective bargaining agreement and the severance of seniority rights. We ordered a new trial limited solely to the damage issues as to plaintiff's claim for relief under section 301. We directed that the jury was entitled to consider the evidence as to the activity of the Union (initially treated as a single entity)[2] in inducing the

[1]The Honorable Richard E. Robinson, then Chief Judge, United States District Court for the District of Nebraska.

[2]It was not until the section 301 suit was remanded for trial on damages that the International and the Local urged that the respective liability of each should be separately determined. *Richardson v. Communications Workers*, 486 F.2d 801, 803-04 (8th Cir. 1973).

wrongful discharge so that it might then apportion the damages between the Company and the Union on the basis of their respective roles in causing the discharge. We directed that damages should include future earnings and an evaluation of seniority rights plaintiff may have had which were lost. We also directed that plaintiff be given an opportunity to plead against the Union, as a separate count, damages for mental distress for the alleged violation of its statutory duty to avoid intentional discrimination against him up to and including the time of his discharge. *Richardson v. Communications Workers*, 443 F.2d 974 (8th Cir. 1971).

After remand plaintiff filed an amended complaint alleging two causes of action, the first against the Company and the two unions for wrongful termination of his employment, and the second against the unions for mental anguish. On the first claim for loss of employment the jury returned a verdict in favor of plaintiff Richardson in the sum of $92,000, apportioned 30% to the employer, Western Electric, and 70% to the unions, pursuant to the district court's direction to treat the two unions as joined. Upon Richardson's second claim for mental anguish against the unions, the jury awarded him $250,000.

Upon motion of the unions the district court granted a new trial on the second claim (Count II) for mental distress, anguish and humiliation upon the grounds that the jury "rendered its verdict as the result of passion, prejudice, mistake, or some other improper reason." In its discussion the district court stated "[i]t is clear that the verdict was excessive and intended to punish the defendants or resulted from some other improper reason."[3] However, the court

[3]The district court pointed out that punitive damages are not permitted in Nebraska. Plaintiff made no claim for punitive damages.

denied the motion of the unions to set aside the verdict or grant a new trial on the first claim (Count I), for lost wages, benefits and seniority rights in the amount of $64,400. This court, upon certification under Fed. R. Civ. P. 54(b), affirmed the judgment on Count I. See *Richardson v. Communications Workers, supra*, 486 F.2d 801 (8th Cir. 1973).[4] Western Electric did not appeal from the judgment against it on Count I in the amount of $27,600.

In the third trial the jury returned a verdict in favor of each defendant union on the mental distress claim under Count II. The court ordered that judgment entered in favor of each defendant on the jury verdict. The court further ordered that plaintiff recover from the defendant unions the sum of $10,000 for his reasonable attorney fees in the prosecution of his claim on Count I that the wrongful discharge of plaintiff was caused by actions of the unions.

In this appeal plaintiff Richardson charges (1) the order for a new trial on the mental distress issue (Count II) was an abuse of discretion; (2) prejudicial errors in the recent trial (Count II) require a new trial; and, (3) the allowance of $10,000 in attorney fees was unreasonably low. The unions, in addition to denying plaintiff's charges, urge by cross-appeal that the award of attorney fees to plaintiff was improper.

Order for New Trial

Plaintiff claims the trial court abused its discretion in

[4]Prior thereto plaintiff's appeal from the order for new trial and the unions' appeal from the $64,400 judgment was dismissed by this court for lack of jurisdiction, on the grounds that the order for new trial was not an appealable order and the judgment against the unions had not been certified under Fed. R. Civ. P. 54(b). *Richardson v. Communications Workers*, 469 F.2d 333 (8th Cir. 1972).

ordering a new trial on the mental distress claim upon the grounds that the $250,000 award was excessive and "the result of passion, prejudice, mistake, or some other improper reason." Plaintiff argues that since in this case the inference of passion or prejudice was drawn from the size of the verdict alone, a remittitur or a new trial limited to damages would have adequately remedied the supposedly erroneous verdict, without resorting to the penalty of a new trial.

In excessive verdict cases we have held that "whether the ends of justice will be served by ordering a reduction of the verdict, or whether a new trial must be had, are primary questions for the trial court." *Perry v. Bertsch*, 441 F.2d 939, 943 (8th Cir. 1971). The function of the reviewing court in such cases is limited to a determination of whether the trial court abused its discretion in making the determination it did. *Id.* See also *Bankers Life & Casualty Co. v. Kirtley*, 307 F.2d 418, 426 (8th Cir. 1962).

The standard we apply for review of the trial court's refusal to set aside a jury verdict on the grounds of excessiveness or inadequacy was reviewed by Judge Blackmun, now Justice Blackmun, in *Solomon Dehydrating Co. v. Guyton*, 294 F.2d 439, 447-48 (8th Cir. 1961) and is summarized as follows:

> "[I]n our opinion, inadequacy or excessiveness of a verdict is basically, and should be, a matter for the trial court which has had the benefit of hearing the testimony and of observing the demeanor of the witnesses and which knows the community and its standards; that this is a responsibility which, for better working of the judicial process and for other seemingly obvious

> reasons, is best placed upon its shoulders; and that we shall continue to consider review, as we have said before, not routinely and in every case, but only in those rare situations where we are pressed to conclude that there is 'plain injustice' or a 'monstrous' or 'shocking' result."

We have continued to adhere to this standard. *Snodgrass v. Nelson,* 503 F.2d 94 (8th Cir. 1974); *Scoville v. Missouri Pacific Railroad,* 458 F.2d 639 (8th Cir. 1972); *Century "21" Shows v. Owens,* 400 F.2d 603, 611-12 (8th Cir. 1968). We have also held that the standard we will apply in determining whether there was an abuse of discretion in ordering a remittitur is whether the remittitur was ordered for an amount less than the jury could reasonably find. *Slatton v. Martin K. Eby Construction Co.,* 506 F.2d 505 (8th Cir. 1974). In applying this standard we reiterated the *Solomon* standard, *supra,* 294 F.2d at 447, that inadequacy or excessiveness of a verdict is basically a matter for the trial court.

In summary, we will not disturb a trial court's grant of a new trial for an excessive verdict absent a clear abuse of discretion. Here the trial court properly recognized that plaintiff's damages arising from invidious discrimination were to be measured in terms of the mental distress, anguish and humiliation caused him, but not as a means of punishing defendants. The court concluded "that the verdict was excessive and intended to punish the defendants or resulted from some other improper reason" and ordered that a new trial be granted. We are satisfied from our review of the record that the trial court did not

abuse its discretion in ordering a new trial in lieu of a remittitur. *Perry v. Bertsch, supra,* 441 F.2d at 943.[5]

Neither was there an abuse of discretion in failing to limit the new trial to damages only. The nature of the case was such that the liability and damages issues were interwoven to such an extent that a trial on damages alone would have been inappropriate. Plaintiff's claim for mental anguish and humiliation involved conduct by a larger number of individuals over a seven-month period. In determining damages to be awarded against the Local or International, or neither or both, it was necessary for the jury to determine who committed what acts and the responsibility of the parties under applicable principles of agency. Thus the issues of damages and liability were so intertwined as to be inseparable. Under these circumstances a partial trial on damages alone would have been improper. See *Gasoline Products Company v. Champlin Refining Co.,* 283 U.S. 494, 500 (1931); *Vidrine v. Kansas City Southern Railway,* 466 F.2d 1217, 1221 (5th Cir. 1972); *United Air Lines, Inc. v. Wiener,* 286 F.2d 302, 306 (9th Cir. 1961). No abuse of discretion in granting a new trial on all issues arising under the mental anguish claim has been shown here.[6]

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[5] We consider plaintiff's claim that the district court applied erroneous legal standards in denying the motion for new trial on the grounds of excessiveness to be devoid of merit.

[6] We need not reach defendants' claim that the verdict was the product of an appeal to passion and prejudice by plaintiff's improper and prejudicial "golden rule" argument to which defendants objected. See *Chicago & N.W. Ry. v. Kelly,* 84 F.2d 569, 576 (8th Cir. 1936); *Klotz v. Sears, Roebuck & Co.,* 267 F.2d 53 (7th Cir. 1956).

Alleged Prejudicial Errors in the Third Trial

Plaintiff urges that the court erred in refusing to direct a verdict of liability against both defendants in the third trial because of the jury's findings with respect to (1) the unions' failure in good faith to fairly represent plaintiff in processing his grievance; (2) the unions' breach of their duty not to discriminate against or intimidate plaintiff because of his nonmembership in the union; and, (3) the unions' actions in causing the wrongful discharge of plaintiff. See 443 F.2d at 977-78. The difficulty is that these findings were made with respect to the section 301 claim and this court therefore remanded for a new trial limited solely to the damage issues. However, as to the mental distress claim arising from intentional discrimination this court clearly directed that it was to be submitted to the jury to pass on both liability and damages. See 443 F.2d at 985 n. 14. Obviously the claim for mental distress "is separate and distinct from the Union's responsibility for its apportioned damage with the employer under § 301(a)." 443 F.2d at 983.

While the jury in the first trial had found that the unions were responsible for plaintiff's discharge and had discriminated against him, it did not specify what conduct caused his discharge nor what conduct constituted discrimination. In the instant trial plaintiff offered evidence with respect to various acts which caused him mental distress. In determining liability of either or both of the unions on the distress issue, it was incumbent on the jury to decide what acts actually occurred and who was responsible. The trial court therefore properly denied plaintiff's motion to

direct liability against the defendants.

Plaintiff charges the court erred in refusing to instruct the jury that the Local and the International were a single entity.[7] We disagree. Under 29 U.S.C. § 303 the responsibility of a union for the acts of its officers and members "is to be measured by ordinary doctrines of agency." *United Mine Workers v. Gibbs,* 383 U.S. 715, 736 (1966). The provisions in the International's constitution with respect to control, without more, do not establish an agency relationship for the purposes of this case. See *United Mine Workers v. Coronado Coal Co.,* 259 U.S. 344, 395 (1921); *Barefoot v. International Bhd. of Teamsters,* 424 F.2d 1001, 1004 (10th Cir. 1970). The single entity claim was properly submitted to the jury under appropriate instructions. *Great Coastal Express, Inc. v. International Bhd. of Teamsters,* 511 F.2d 839, 843-44 (4th Cir. 1975).

Plaintiff next complains that certain agency instructions were erroneous. The court's instructions with respect to the unions' responsibility for the conduct of their officers, stewards, and members were thorough, and in conformance with the ordinary doctrines of agency which were applicable. *Gibbs, supra,* 383 U.S. at 736; *Wagner Electric Corp. v. Local 1104, Int'l Union of Radio and Machine Workers,* 496 F.2d 954 (8th Cir. 1974). Plaintiff's objections fail to take into consideration the instructions as a whole. We are satisfied from our examination of the instructions that no error was committed therein.

Plaintiff contends the court erred in refusing to sustain

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[7] In the second trial (first trial on mental distress) the court had so instructed. In the instant (third) trial the court left the issue of agency as between the International and the Local to the jury.

his written motion prior to trial challenging for cause all active members of the AFL-CIO unions. Seven veniremen were active members of AFL-CIO unions. All but one were excused by the court upon admission of bias. One juror not excused belonged to a union affiliated with the AFL-CIO. He was a member of the International Brotherhood of Carpenters. In response to inquiry by plaintiff's counsel he indicated he had not attended a union meeting in years and had not heard anything about the union's attitude toward right-to-work laws. We find no abuse of discretion on the part of the trial court in refusing to disqualify summarily all union members without some indication of bias. None has been shown.[8]

Plaintiff urges that we reverse and order a new trial on the grounds that the verdict was contrary to the weight of the evidence. Taking the evidence most favorable to the defendants as we must, we hold there was adequate basis in the record to warrant a jury finding in favor of the defendant unions.

Allowance of Attorney Fees

Following the second trial in which the jury returned a verdict of $92,000 on Count I and $250,000 on Count II the district court entered its order granting the new trial on Count II and, finding no just cause to delay, ordered entry of judgment on Count I. Fed. R. Civ. P. 54(b). Thereafter, plaintiff filed a timely motion to modify the judgment on

[8]Claimed errors because of comments made by the trial court in ruling on evidence are so devoid of merit that discussion thereof is not warranted.

Count I to include an award of attorney fees. Three days later defendant unions filed their motion of appeal on Count I. Subsequently the district court sustained a motion by plaintiff to postpone a hearing on his motion for attorney fees until the issues on Count II were finally resolved. Subsequent to the jury's verdict in favor of defendant unions on Count II the district court after a hearing awarded plaintiff $10,000 "for legal fees in the prosecution of this case."

In this appeal plaintiff contends the attorney fee awarded was unreasonably low. Defendant unions contend this case is not a proper case for an allowance of attorney fees; the claim for fees filed after entry of judgment was untimely; the award thereof after our mandate affirming the judgment on Count I was beyond the authority of the district court; all claims arising under Count I were merged in the judgment thereon; and, plaintiff's "satisfaction of judgment" bars the subsequent award of fees.

We are satisfied that the district court had jurisdiction to hear the motion for fees despite the fact that the claim for attorney fees was neither pled nor fully proven at the trial. *Sprague v. Ticonic National Bank*, 307 U.S. 161 (1939). Further, the mandate of this court affirming the judgment on Count I did not encompass the claim for attorney fees. *Sprague, supra.* Thus the claim for attorney fees was neither untimely nor its consideration beyond the authority of the district court. Further, when plaintiff executed the "satisfaction of judgment" on Count I the postponed hearing on attorney fees had not been held. Thus, plaintiff's claim for fees was not merged in the judgment that was satisfied. We agree with the district court that it had the

authority to make an award of attorney fees on the motion then pending even though a satisfaction of judgment had been entered.[9]

This brings us to the question of whether this was a proper case for an allowance of attorney fees. The district court found:

> "There was evidence from which the jury could have found that union officials not only failed to pursue the plaintiff's employment rights, but that they actually lobbied for his discharge from employment. In any event, without speculating as to what may have motivated the jury, it is clear from the manner in which the damages were apportioned that the jury regarded the unions' breach as aggravated. The Court agrees, to the extent that in the absence of mitigating circumstances the intentional failure of a labor union to discharge its fiduciary duty represents bad faith and establishes the plaintiff's right to recover his reasonable counsel fees."

In *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), the Supreme Court recognized certain exceptions to the "American rule" that attorney fees are not ordinarily recoverable by the prevailing party in federal litigation absent statutory authorization. These include "when the losing party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons.' " *Id.* at 258-59, *quoting from F. D. Rich Co v. United States ex rel. Indus. Lumber Co.*, 417 U.S. 116, 129 (1974). See *Doe v. Poelker*, 515 F.2d 541,

[9]The district court commented that at the hearing on attorney fees "the defendants have made no effort to demonstrate that the parties intended the attorney's fee claim to be included in the Satisfaction of Judgment."

547 (8th Cir. 1975).

In the original trial the jury found in answer to special interrogatories that the Unions breached that part of the collective bargaining agreement which proscribed discrimination against employees because of nonmembership in the Union. It also found that plaintiff's wrongful discharge was proximately caused by actions of the Unions. 443 F.2d at 977-78. The district court found that the intentional failure of the Union to discharge its fiduciary duty to nonmember employees represented bad faith and established plaintiff's right to recover attorney fees.

We conclude from our examination of the record that there is ample support for a finding of bad faith on the part of the Unions in not only failing to represent plaintiff in his grievance but in actually inducing his wrongful discharge. We agree that this is a proper case for an award of attorney fees on Count I because the Unions' bad faith comes within the bad faith exception noted in *Alyeska*. *Accord, Doe v. Poelker, supra,* 515 F.2d at 547-49.

Plaintiff made application to the district court for an award of attorney fees in the amount of $168,375 based upon the rate of $75 per hour for 2,245 hours of legal service. Plaintiff now claims the court's award of $10,000 for attorney fees was unreasonably low.[10] Plaintiff further claims it was error to award costs against the plaintiff in the third trial. Defendants having prevailed in the third trial, plaintiff's claim for costs is devoid of merit.

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[10]Plaintiff further claims that failure to include expenses in the award was error. The record indicates costs were taxed in the regular way by the clerk and were not challenged as provided for in Fed. R. Civ. P. 54(d). This challenge will not now be considered.

The burden was on plaintiff to establish the time which he had spent in prosecuting his claim on Count I. *Grunin v. International House of Pancakes*, 513 F.2d 114, 127-28 (8th Cir. 1975). He failed to separate the portion of his time spent in the unsuccessful prosecution of his claim on Count II. The allowance of attorney fees rests with the discretion of the trial court and will not be disturbed absent a showing of an abuse of discretion. *Grunin, supra*, 513 F.2d at 126. We find no such abuse here.[11]

Affirmed.

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[11] Sizeable attorney fees were collected by plaintiff's attorney on the Count I award of $92,000. Plaintiff's attorney had been retained on a contingent fee basis.

MEMORANDUM DECISION OF COURT ON APPLICATION FOR ATTORNEYS FEES BY PLAINTIFF AND ORDER THEREON

In the United States District Court for the District of Nebraska

DALE C. RICHARDSON, Plaintiff, vs. COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, LOCAL 7495; COMMUNICATIONS WORKERS OF AMERICA, INC., AFL-CIO. Defendants.

Filing 226, June 12, 1975

MEMORANDUM

APPEARANCES: For Plaintiff–Edward Fogarty, Esq. and Dan J. Whiteside, Esq.

For Defendants–J. Patrick Green, Esq. and David Lathrop, Esq.

ROBINSON, Senior Judge.

THIS MATTER is before the Court on the plaintiff's application for the recovery of attorneys fees incurred by him in this action against his former employer and international and local labor unions arising under § 301 of the Labor Management Relations Act of 1947, 61 Stat. 156, 29 U.S.C.A. § 185 (1965). The employer has previously been dismissed from this action. The plaintiff's Amended

Complaint charged the Unions in Count I. with violating its duty of fair representation, see *Vaca v. Sipes,* 386 U.S. 171, 87 S. Ct. 903, 17 L. Ed. 2d 842 (1967), and in Count II. with intentionally discriminating against the plaintiff on the basis of his non-membership in the defendant unions. The plaintiff did not demand a recovery of his counsel fees in his complaint.

On September 16, 1971,[1] the jury awarded damages to plaintiff on both counts. Subsequently, the Court sustained a defense motion for a new trial as to Count II. On December 5, 1972, the Court, finding, "no just cause to delay" ordered the entry of judgment on Count I.[2] Fed. R. Civ. P. 54 (6). Thereafter the plaintiff filed a timely motion to "modify" the December 5th judgment to include an award of attorney's fees. Three days later the defendants filed their notice of appeal as to the judgment on Count I. of the complaint. The Court subsequently sustained a motion by the plaintiff to postpone a hearing on its motion to "modify" the December 5th judgment until the issues in Count II. were finally resolved. The defendants then proceeded with the prosecution of their appeal and on October 26, 1973, the verdict and judgment as to Count I. were affirmed

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[1]The September 16, 1971, trial was the second trial in this case. After the judgment of the first trial of February 17, 1969, was reversed on appeal, *Richardson v. Communication Workers of Amer., AFL-CIO,* 443 F.2d 974 (8th Cir. 1971), the September 16th trial was held limited solely to the issues of damages as to Count I, and liability and damages as to Count II.

[2]An order for the entry of judgment on Count I had previously been entered by the Court, but since no finding of "no just cause for delay" had been made, the judgment was not *final* for purposes of appeal. Fed. R. Civ. P. 54(b); *Richardson v. Communication Workers of Amer. AFL-CIO,* 469 F.2d 333 (8th Cir. 1972), *cert. denied,* 414 U.S. 818, 94 S. Ct. 38, 38 L. Ed. 2d 50 (1973). Therefore, appropriate findings were made, and final judgment was entered on December 5, 1972.

Richardson v. Communication Workers of Amer. AFL-CIO, 486 F.2d 801 (8th Cir. 1973).

The following January the parties made arrangements for the satisfaction of the December 5th judgment. A check was presented to plaintiff's counsel on or about January 29, 1974, and he, in turn, executed a document entitled "Satisfaction of Judgment". (Filing No. 189).

On June 3, 1974, trial was held on Count II of the Amended Complaint and the jury returned a verdict in favor of the defendants. Accordingly, pursuant to the prior order of the Court, the present matter was called up for hearing on October 15, 1974.

I. JURISDICTION OF THE COURT

The defendants contend that in light of the foregoing facts, this Court lacks jurisdiction to hear the present motion. First, they contend that since the plaintiff did not include a claim for attorney's fees in his Amended Complaint, or offer evidence as to the reasonable value of his counsel's services at trial, this Court lacks the jurisdiction to go outside the record to grant attorney's fees on a timely filed motion to amend judgment. See *Sylan Beach, Inc. v. Koch,* 140 F.2d 852 (8th Cir. 1944); *Davis v. Naviera Aynar S.A.,* 37 F.R.D. 223 (D. Md. 1965); but see Fed. R. Civ. P. 59(e); *Sprague v. Ticonic National Bank,* 307 U.S. 161, 169, n. 9, 59 S. Ct. 777, 83 L. Ed. 1184 (1939).

Second, they contend that although the Court postponed hearing the plaintiff's motion to amend judgment, the Court lacks jurisdiction to amend such judgment because that judgment has been appealed to the Circuit Court of Appeals and

the mandate from that Court does not include an award of fees. *Contra Sprague v. Ticonic National Bank, supra.*

A. Jurisdiction To Amend The Judgment Of December 5, 1972.

In the present case, though the plaintiff relies entirely upon the evidence adduced at trial to establish his entitlement to his attorney's fees, the defendants seem to contend that because the plaintiff did not demand his fees in his complaint, or offer evidence as to the value of his counsel's services at trial, that he is somehow now barred from claiming his fees through a timely filed post-judgment motion. *Cf. Sylan Beach, Inc. v. Koch, supra; Davis v. Naviera Aynar S.A., supra.* In other words, the issue here is merely whether or not this Court has jurisdiction to hear a timely filed motion to amend judgment to include a recovery of counsel fees where the evidence adduced at trial is such as to evoke the Court's equitable powers, but where the prevailing party has failed to present evidence at trial relating to the value of his counsel's services. *Compare Lichtenstein v. Lichtenstein,* 55 F.R.D. 535 (E.D. Pa. 72), *rev'd on other grounds,* 481 F.2d 682 (3rd Cir. 1973), *cert. denied,* 414 U.S. 1144, 94 S. Ct. 895, 39 L. Ed. 2d 98 (1974); *Stacy v. Williams,* 50 F.R.D. 52 (N.D. Miss. 1970), *affirmed,* 446 F.2d 1366 (5th Cir. 1971); and *Davis v. Naviera Aynar S.A., supra;* also see *Ocean Accident & Guarantee Corp. v. Heald,* 30 F. Supp. 991 (E.D. Pa. 1939). This is, of course, precisely the method implicitly approved by the Supreme Court in *Sprague v. Ticonic National Bank, supra,* 307 U.S. at 169, n. 9, for raising the question of a party's equitable entitlement to

his fees. In both the *Lichtenstein* and *Stacy* cases, the courts seemed to presume, without discussion, that attorney's fees could be recovered through a timely filed motion to alter or amend judgment, even though attorney's fees had not been demanded in the complaint or proven at trial. This impresses the Court as an eminently proper procedure in light of *Sprague.* The recoverability of attorney's fees ordinarily falls within the traditional equitable jurisdiction of the court. The prevailing party's entitlement to his fees is determined by the facts as they are adduced at trial. Where those facts suggest that the prevailing party is entitled to his fees, such an award is clearly a portion of the complete relief to which that party is entitled. Fed. R. Civ. P. 54(c). Since the fee question is ordinarily addressed to the equitable jurisdiction of the court, the losing party has no right to have the matter resolved by a jury. Indeed, where the basic claim is tried to a jury it may be confusing to the jury, and embarrassing and prejudicial to the parties to require that such evidence be presented as part of the prevailing party's case.

In any event, since the matter is addressed to a court of equity, it is clear that where a party has established his entitlement to his fees at trial, a court could grant a timely filed motion for a new trial, limited solely to the question of the reasonable value of plaintiff's counsel's services, *Ocean Accident & Guarantee Corp. v. Heald. supra,* and that the court should grant such a motion to provide complete justice between the parties. Although the present motion is styled as a motion to "modify" judgment, it would, of course, be within the Court's discretion to treat the motion as a motion for new trial. Fed. R. Civ. P. 8(f). However, the style of the motion seems irrelevant to the question. Whether

it is treated as a motion for a new trial, *Id.*, a motion to amend judgment, *Stacy v. Williams, supra,* or a motion to amend the bill of costs, *Lichtenstein v. Lichtenstein, supra,* the motion is timely filed under rule 59, seeks a type of relief to which the plaintiff is allegedly equitably entitled, and is not prejudicial to the rights of the defendants. In any event, a court of equity will not permit the style of the motion to dictate the availability of the remedy.

The defendants suggest, however, that other courts, including our own Circuit Court of Appeals, have characterized an award of attorney's fees under § 301 as "compensatory", and that, therefore, the question of fees should "not be split off from a basic claim and separately sought after the basic claim has been determined." *United Steelworkers of Amer. v. Butler Manufacturing Co.*, 439 F.2d 1110, 1112-1113 (8th Cir. 1971); *DeArroya v. Sindicato de Trabajadores Packing, AFL-CIO,* 425 F.2d 281, 293 n. 17 (1st Cir. 1970), *cert. denied,* 400 U.S. 877, 91 S. Ct. 121, 27 L. Ed. 2d 115 (1970). Apparently, the defendants are of the view that attorney's fees in § 301 litigation are an element of the plaintiff's compensatory damages and therefore must be pled and proven as any other claim for damages. Even assuming this to be true it would not preclude this Court from granting the relief which it provides today. *Ocean Accident & Guarantee Corp. v. Heald, supra.* However, it is not altogether clear that the defendants are not attempting to raise a seventh amendment issue by claiming that they are entitled to a jury trial on the issue of fees in § 301 litigation. At least one court has strongly suggested that that may be the proper course in § 301 litigation. *Scott v. Anchor Motor Freight, Inc.*, 496 F.2d 276, 282 (6th Cir. 1974), U.S. *cert. denied.*

However, most courts which have faced the issue seem to be of the opinion that an award of attorney's fees in § 301 litigation falls within the traditional equitable jurisdiction of the court. See *e.g., International U. of Dist. 50, U.M.W. v. Bowman Transp., Inc.*, 421 F.2d 934 (5th Cir. 1970); *Local No. 149 I.U., U.A., A & A.I.W. v. American Brake Shoe Co.*, 298 F.2d 212 (4th Cir. 1962), *cert. denied,* 369 U.S. 873, 82 S. Ct. 1142, 8 L. Ed. 2d 276 (1962); *Rolax v. Atlantic Coast Line R. Co.*, 186 F.2d 473 (4th Cir. 1951); *Sheeder v. Eastern Express, Inc.*, 375 F. Supp. 655 (W.D. Pa. 1974), *American Fed. of TV & Radio Art. v. Taft Broadcasting Co., WDAF*, 368 F. Supp. 123 (W.D. Mo. 1973); *Cf. Dallas Typographical Union No. 173 v. A. H. Belo Corp.*, 372 F. 2d 577 (5th Cir. 1967). The authority in our own circuit seems to follow the traditional rule. *United Steelworkers of Amer. v. Butler Manufacturing Co., supra.* In *Butler* the court characterized fee shifting under § 301 as "compensatory". However, the authority relied upon by the court applies the traditional equitable principles governing fee shifting in the federal courts and this Court is not convinced that either the Circuit Court or the Supreme Court in *Czosek v. O'Mara,* 397 U.S. 25, 90 S. Ct. 770, 25 L. Ed. 2d 21 (1970) or *Vaca v. Sipes, supra,* was persuaded to remove the fee question from the traditional equitable jurisdiction of the Court. Any rule which would require a party to litigation to prove his counsel fees to the jury hearing his claim impresses the Court as one fraught with danger and potential embarrassment and prejudicial to both parties to the litigation.[3]

[3] In some cases a party's attorney's fees is recognized as being a part of his over-all damages and, therefore, must be pled and proven at trial. See *Davis v. Naviera Aynar S. A., supra; Ocean Accident & Guarantee Corp. v. Heald, supra.*

In light of the above, the Court finds that it has jurisdiction to hear the pending motion, despite the fact that the claim for attorney's fees was neither pled nor fully proven at trial.

B. Jurisdiction To Grant Fees In Contravention Of The Mandate Of The Court Of Appeals.

The defendants contend that since the Court of Appeals affirmed the December 5th judgment, this Court now lacks the jurisdiction to hear the pending motion to amend that judgment. Ordinarily there would be no question that this Court lacks the jurisdiction to modify a mandate from the Court of Appeals. However, in the present case, despite the style of this motion as a motion to modify judgment, it is clear that the mandate of the Court of Appeals does not encompass the claim presently before this Court.

When the defendants filed their notice of appeal of the December 5th judgment there was on file in this Court a pending, timely filed motion to amend the December 5th

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3 (cont'd)

But even in such cases it is recognized that the better practice is for counsel to enter into stipulations to have the question of the value of counsel's services submitted solely to the court. *Davis v. Naviera Aynar S.A., supra,* 37 F.R.D. at 225. The reason for this is, of course, because proof as to the value of counsel's services on the case then on trial requires plaintiff's counsel to step out of his role as advocate and give testimony demonstrating his financial interest in the litigation. Such testimony obviously threatens to impeach counsel's credibility both as an advocate and as a witness. Furthermore, since it may be necessary to calculate the probability of appeal, the defendant and/or his counsel might be required to speculate as to his reaction to an adverse verdict. If such a defendant testifies that he will appeal, he is, *inter alia,* enhancing the plaintiff's recovery. If he testifies that he will not appeal, then he is suggesting to the jury that he lacks confidence in his legal position.

In light of the above, and given the traditional equitable nature of the fee question, the Court feels that a rule requiring a party to prove the value of his counsel's services in the litigation then before the Court, to a jury, should be clearly expressed.

judgment. So long as that motion was pending, jurisdiction over the cause of action in Count I. of the Amended Complaint remained in this Court, *Cf. Knox v. U.S. Lines Co.,* 294 F.2d 354 (3rd Cir. 1961); *DeGiovanni v. DeGiovanniantonio,* 233 F.2d 26 (D.C. Cir. 1956); despite the fact that the Court had expressly found no just cause to delay the entry of the December 5th judgment pursuant to rule 54(b).

On March 15, 1973, the Court entered an order postponing any hearing "on the Plaintiff's application for attorney's fees" until a final disposition was made of Count II. of the Amended Complaint. Thereafter, the defendant proceeded with the prosecution of their appeal.

Under such circumstances, the Court feels that it is clear that the mandate of the Court of Appeals did not encompass the plaintiff's motion, which at the time of appeal was pending in this Court. In *Sprague v. Ticonic National Bank, supra,* the court held that an application for attorney's fees which had not even been filed until after the district court had lost jurisdiction over the underlying claim, was properly before the district court notwithstanding the mandate of the Court of Appeals which disposed of the underlying claim without considering the question of attorney's fees. In the present case, before any mandate was handed down this Court severed the plaintiff's claim for fees from the cause of action upon which it was based. Under such circumstances, and in light of *Sprague* it can hardly be doubted that this Court has jurisdiction to hear the pending motion.

II. SATISFACTION OF JUDGMENT

After the December 5th judgment was affirmed by the Court of Appeals, the parties made arrangements for the satisfaction of the judgment. In late January, 1974, the defendants presented a check to plaintiff's counsel in the amount of the judgment plus interest and costs along with a document entitled "Satisfaction of Judgment." (Filing No. 189). On the back of the check, above the plaintiff's endorsement is typed:

> "Settlement in full of *judgment* in Civil Action 02673, first cause of action; United States District Court for the District of Nebraska." (Emphasis added.)

The "Satisfaction of Judgment" which was signed by plaintiff's counsel provides:

> "WHEREAS, on December 5, 1972, a *judgment* was recovered on Count I by the plaintiff . . . against the defendants . . . and
>
> "WHEREAS, said *judgment* has been fully paid to the plaintiff.
>
> "THEREFORE, satisfaction of *the said judgment* is hereby acknowledged. . . . " (Emphasis added.)

The defendants contend that all claims arising under Count I. were merged in the December 5th judgment and that by satisfying the judgment, the defendants have barred the plaintiff from maintaining this motion. See *Little Rock Packing Co. v. Massachusetts Bond & Ins. Co.*, 262 F.2d 327 (8th Cir. 1959).

It will be noted that both documents speak in terms of an outstanding "judgment". When these documents were signed there was no judgment for attorney's fees outstanding against the defendants, and as was demonstrated, *infra*, at Par. I.B. the plaintiff's claim for fees was not merged in the December 5th judgment. Consequently the language of these documents will not support the position that they were effective to release the defendants from liability on a claim which was not included in the December 5th judgment.

At the hearing of October 15, 1974, the defendants have made no effort to demonstrate that the parties intended the attorney's fee claim to be included in the Satisfaction of Judgment. On the contrary their argument has been that the plaintiff has failed to demonstrate that his attorney's fees claim should not be encompassed by the satisfaction. The Court is convinced, however, in light of the language of these documents and *Sprague* that the burden should have been upon the defendants, and that they have failed to carry that burden in this case.

III. RECOVERABILITY OF ATTORNEYS FEES

Several courts have held that in circumstances very similar to those existing in the present case, a prevailing party is entitled to a recovery of his attorney's fees. See, *e.g., DeArroya v. Sindicato de Trabajadores Packing AFL-CIO, supra; Rolax v. Atlantic Coast Line R. Co., supra.* Some courts seem to have based their holding upon the so-called "bad faith" exception to the traditional rule denying a recovery of fees in the absence of contract or

statute, 6 J. Moore, Federal Practice, § 54.77(2), p. 1709 (2nd ed. 1974), while others seem to have applied a broader principle in line with the doctrine of *Newman v. Piggie Pack Enterprises, Inc.*, 390 U.S. 400, 88 S. Ct. 964, 19 L. Ed. 2d 1263 (1968). See *DeArroya v. Sindicato de Trabajadores Packing AFL-CIO, supra;* but see *Alyeska Pipeline Service Co. v. Wilderness Society*, No. 73-1977 (Sup. Ct. filed May 12, 1975), 73 L. W. 4561.

In the present case, the jury in the first trial found that the defendant unions had failed to fairly represent the interests of the plaintiff, a non-member employee, toward whom they owed a duty of trust. There was evidence from which the jury could have found that union officials not only failed to pursue the plaintiff's employment rights, but that they actually lobbied for his discharge from employment. In any event, without speculating as to what may have motivated the jury, it is clear from the manner in which the damages were apportioned that the jury regarded the unions' breach as aggravated. The Court agrees, to the extent that in the absence of mitigating circumstances the intentional failure of a labor union to discharge its fiduciary duty represents bad faith and established the plaintiff's right to recover his reasonable counsel fees.

The defendants suggest that the bad faith exception is inapplicable in the present case because that exception applies only when the losing party's bad faith relates to the manner in which he has conducted the development and presentation of his case. They suggest that an award of fees is not appropriate when, as here, the only bad faith shown relates to the "underlying conduct upon which the litigation was based." (Brief of defendants, p. 24).

> "[I]t is clear, however, that 'bad faith' may be found . . . in the actions that led to the lawsuit . . . [as well as] in the conduct of the litigation."

Hall v. Cole, 412 U.S. 1, 15, 93 S. Ct. 1943, 36 L. Ed. 2d 702 (1973). The equitable considerations which may justify fee shifting in a given case simply will not justify the distinction suggested by the defendants. See *United Steelworkers of Amer. v. Butler Manufacturing Co., supra; De Arroya v. Sindicato de Trabajadores Packing AFL-CIO, supra; Local No. 149 I.U., U.A. A. & A.I.W. v. American Brake Shoe Co., supra; Rolax v. Atlantic Coast Line R. Co., supra.*

Finally, the defendants suggest that even if the plaintiff is entitled to recover his fees relating to his prosecution of Count I, he should not be permitted to recover fees relating to Count II since the defendants ultimately prevailed on that count. However, a party need not prevail on every aspect of his complaint in order to recover his fees. *Reed v. Arlington Hotel Company, Inc.*, 476 F.2d 721 (8th Cir. 1973), *cert. denied,* 414 U.S. 854, 94 S. Ct. 153, 38 L. Ed. 2d 103 (1974), nor is it always that easy to separate fees relating to two separate counts each arising out of the same basic facts. Consequently, while the defendants' suggestion has a certain appeal, it is not practical in every case.

Nevertheless, one of the considerations which a court should make in determining the proper amount to award a prevailing party for his attorney's fees is the result which he has obtained. A.B.A. Code of Professional Responsibility. Canon 12(4). Consequently, while the Court will not lay down the rule that fees can only be recovered for the

prosecution of claims upon which the party seeking his fees has prevailed, it does adhere to its responsibility to consider the result ultimately achieved by the prevailing party, in determining the amount which can properly be awarded. *Schaeffer v. San Diego Yellow Cabs, Inc.*, 462 F.2d 1002 (9th Cir. 1972).[4]

IV. AWARD

The plaintiff has prayed for fees in the amount of $168,375.00 based upon the rate of $75 per hour for 2,245 hours of legal service. In full recognition of the complexities of this case, the Court is of the view that this fee is grossly excessive in light of the history of this case and the result obtained. A $168,000 fee is almost twice the amount the plaintiff has recovered to this point which itself is a substantial sum. Where damages such as those found in the present case are recoverable it is not necessary, either for the purpose of attracting competent legal counsel, *Newman v. Piggie Park Enterprises, Inc.*,

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[4] The defendants have also suggested that the plaintiff should be denied his fees because he has made a substantial recovery in this case. They point out that one of the factors justifying fee shifting in § 301 litigation found by the Court in *DeArroya v. Sindicato de Trabajadores Packing AFL-CIO*, *supra*, 425 F.2d at 293, n. 17 was that the anticipated recovery from § 301 litigation was perhaps "too insubstantial to sustain competent counsel's best efforts." The defendants correctly point out that the rules established in this case have changed all that, and that, therefore, a recovery of attorney's fees is no longer called for.

The Court, however, feels that to deny fees entirely, even though a substantial recovery has been made, is to fail to recognize both the compensatory and punitive nature of fee shifting in § 301 litigation based upon a finding of bad faith. *Hall v. Cole*, *supra*, 412 U.S. at 5, *United Steelworkers of Amer. v. Butler Manufacturing Co.*, *supra*, 431 F.2d at 1112-1113; *Rolax v. Atlantic Coast Line R. Co.*, *supra*. Consequently, while the amount recovered on the basic claim may be relevant to any fee award, it does not, under the circumstances, preclude the Court from equitably distributing the costs of this action.

supra, penalizing the defendant, see *Hall v. Cole*, *supra*, or compensating the plaintiff, *United Steelworkers of Amer. v. Butler Manufacturing Co.*, *supra*, to so let the tail wag the dog as to assess legal fees grossly in excess of the amount recovered. The Court is not unmindful that this case established the precedent permitting individuals who have been wronged under § 301 to recover substantial damages. Nor is it unmindful that the plaintiff has vindicated an important public policy through his prosecution of this claim. Both of these considerations are relevant under the circumstances of this case. But, nevertheless, this Court is convinced that no fair-minded man would fail to recognize that the amount suggested grossly exaggerates the wrong that has been done to the plaintiff.

Accordingly, in recognition of the importance of this case, the hours of labor reasonably attributable to the result achieved here, the alleged business lost by the plaintiff's counsel as a result of his participation in this case, the compensation due the plaintiff, and all of the other factors present, particularly the liberal award of damages by the jury to the plaintiff, an Order will be entered awarding the sum of Ten Thousand Dollars ($10,000.00) for legal fees in the proseuction of this case.

Dated this 11th day of June, 1975.

ORDER ON ATTORNEYS FEES

Filing 227, June 12, 1975

THIS MATTER having been tried before the Court and Jury and verdict having been rendered,

ACCORDINGLY,

IT IS ORDERED AND ADJUDGED that the plaintiff, Dale C. Richardson, recover nothing from the defendants, Communication Workers of America, AFL-CIO and Communication Workers of America, AFL-CIO, Local 7495 on the Second Cause of Action in his Amended Complaint and that the defendants have judgment on the verdict against the plaintiff and recover from said plaintiff their costs attributable to the trial of this matter to the jury.

IT IS FURTHER ORDERED AND ADJUDGED that the plaintiff, Dale C. Richardson, recover from the defendants, Communication Workers of America, AFL-CIO and Communication Workers of America, AFL-CIO, Local 7495, jointly and severally, the sum of Ten Thousand Dollars ($10,000.00) for his reasonable attorney's fee in the prosecution of this action together with interest and the costs attributable to said plaintiff's application for attorney's fees.

Dated this 11th day of June, 1975.

BY THE COURT:

Richard E. Robinson

Senior Judge, United States
District Court

OPINION OF THE COURT BELOW
FILED: OCTOBER 26, 1973
[486 F.2d 801 (8th Cir. 1973)]

In the United States Court of Appeals for the Eighth Circuit.

DALE C. RICHARDSON, Appellee, v. COMMUNICATION WORKERS OF AMERICA, AFL-CIO, and COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, LOCAL 7495, Appellants.

No. 73-1018

Submitted: September 10, 1973

Appeal from the United States District Court for the District of Nebraska.

Before VAN OOSTERHOUT, Senior Circuit Judge, LAY and ROSS, Circuit Judges.

LAY, Circuit Judge.

This is an action by Dale C. Richardson under § 301(a) of the Labor Management Relations Act, 1947, 29 U.S.C. § 185(a)[1] against his former employer, Western Electric

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[1] 29 U.S.C. § 185(a) reads:

"Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

Company, and the Communications Workers of America, AFL-CIO (hereinafter called the International) and Local 7495, an affiliate of the International (hereinafter called the Local). The claim initially arose from an alleged breach of the existing collective bargaining agreement in which Richardson claimed that by reason of his nonunion membership he was wrongfully discharged from his employment with Western Electric. In the first trial Richardson received a verdict of $20,000. However, the trial court reduced the verdict to $1,500 on the ground that damages were allowable only for six and one-half months—the remaining life of the collective bargaining agreement. On appeal, this court held that ruling to be error. We also held to be error the district court's refusal to entertain palintiff's suit for mental anguish arising out of the unions' alleged intentional discrimination. We remanded the case for a new trial in the § 301 suit on damages only and additionally ordered a reinstatement of the discrimination claim against the unions. See *Richardson v. Communications Workers*, 443 F.2d 974 (8th Cir. 1971).

On the second trial the jury awarded damages in the § 301 suit against the employer, Western Electric, as well as against both unions, in the sum of $92,000. The jury apportioned the damages according to the respective roles of the defendants in the wrongful discharge of Richardson, 30% against Western Electric and 70% against the defendant unions. The Court thereafter entered judgment against the unions jointly in the sum of $64,400. It is from this judgment that the unions now appeal.[2] Western Electric did not appeal.

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[2]The jury additionally awarded the sum of $250,000 against the unions on the second claim arising from the alleged intentional discrimination. Separate

On this appeal the unions claim that the trial court erred in (1) charging that the Local and International Unions were responsible for the acts of the members, officers, and stewards as a matter of law; (2) failing to sever the question of the International's liability from that of the Local and thereby failing to instruct the jury to apportion the damage between the two unions; and (3) refusing to grant a new trial on the ground that the damages of $92,000 were excessive. We affirm the judgment of the district court.

The first two claims were not raised by the unions until the § 301 suit was remanded for a new trial on damages. In the original trial, the jury found each of the defendants liable for the wrongful discharge in breach of the collective bargaining agreement. The record fails to show that either union sought a directed verdict in the first trial on the theories now raised.[3] When the trial court reduced the original verdict to $1,500, the plaintiff filed a notice of appeal and the employer and the unions cross-appealed. However, the only ground of the unions' cross

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2 (cont'd)

appeals were lodged by both unions from the judgment on the first claim under § 301, the subject of this appeal, and by the plaintiff Richardson from the district court's order granting the unions a new trial on the second claim relating to damages for mental distress. This court refused to entertain both appeals on the jurisdictional basis that neither order was appealable. We held that a grant of a motion for new trial is not a final order and that, since a claim between the parties was therefore still pending in the district court, there was no final judgment yet appealable under the § 301 claim. *Richardson v. Communications Workers*, 469 F.2d 333 (8th Cir. 1972), *cert. denied*, ... U.S. ..... (19 .....). Thereafter defendants secured an order from the district court under Rule 54(b) of the Federal Rules of Civil Procedure and their appeal from the § 301 judgment was properly lodged in this court. We find no merit in plaintiff's claim that the district court was without authority to enter the 54(b) order before the issuance of mandate in the second appeal. The orders appealed from were not final and therefore the entire case still rested in the district court. *Cf. Gallon v. Lloyd-Thomas Co.*, 261 F.2d 26 (8th Cir. 1958); *Ruby v. Secretary of the United States Navy*, 365 F.2d 385, 388 (9th Cir. 1966) (en banc), *cert. denied* 386 U.S. 1011 (1967).

[3]The record discloses that the motion for directed verdict in the first trial was dictated into the record by the unions' attorney and was based only on two

appeals, even though there existed a judgment of liability against both unions, asserted that the plaintiff should have exhausted his administrative remedy provided by contract. No challenge was made as to the issues governing liability now raised.

The unions here urge that the prior finding of liability does not specify the *basis in fact* for such liability and therefore the International's liability for the acts of the Local should have been left to the jury. We disagree. Although the prior finding of the jury was that the International *separately* breached its duty in failing to adequately represent the plaintiff, the basis of liability as instructed upon by the trial court relates to agency principles.[4] In the original trial the court considered the liability of the International to be a question of fact under all the evidence. The trial court there instructed:

> "In order for the conduct of the local union through its agents to be attributed as also being the conduct of the international, the international union must join with the local in authorizing the general conduct which led to the breach of contract, if any, or sympathized or by some other means required such conduct."

In our prior opinion ordering a new trial on damages we discussed the unions as a single party since no claim as

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3 (cont'd)

grounds: (1) that the plaintiff had failed to prove a prima facie case under § 301 and (2) that plaintiff had failed to prove conspiracy.

[4] Article 5, § 2 of the bargaining agreement specifies that the International delegates to each of its Locals the right to process all grievances initiated by the employees. In the instant case, the Local refused to process Richardson's grievance. Thus, there was a clear basis upon which the jury could find that the International breached its agreement and as to these facts the action of the Local did become the action of the International.

to their having any separate interests was raised on appeal.[5] We remanded the case with directions to try the cause on damages only with apportionment of fault between the employer and the "union" to be determined under the principles of *Vaca v. Sipes*, 386 U.S. 171 (1967).

The earlier judgment of the district court is the law of the case as it reflects upon any possible defenses to liability of the two unions. See, e.g., *United States v. Hoffa*, 402 F.2d 380, 387 (7th Cir. 1968), *cert. denied*, 400 U.S. 1000 (1971); *White v. Murtha*, 377 F.2d 428, 431-432 (5th Cir. 1967); *Stonega Coke & Coal Co. v. Price*, 116 F.2d 618, 621 (4th Cir. 1940); *Toucey v. New York Life Ins. Co.*, 112 F.2d 927, 928 (8th Cir. 1940), *aff'd*, 313 U.S. 538 (1941); 1B Moore's Federal Practice ¶ 0.404 [10] (2d Ed. 1965). The defendants' failure to properly preserve these defenses in their motion for directed verdict in the original trial and their total abandonment of these issues on the original appeal precluded their consideration in the second trial and prevents the unions from belatedly raising these issues on appeal. These questions have been adjudicated and no appeal has ever been properly perfected challenging them. As such, the unions are precluded from challenging the finding of liability on the § 301 charge on this appeal. *Cf. Smith v. American Guild of Variety Artists*, 368 F.2d 511 (8th Cir. 1966), *cert. denied*, 387 U.S. 931 (1967).

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[5] In the original proceeding, the unions responded to plaintiff's complaint with a joint answer filed by the same attorney. The answer did not allege that the defenses of the two unions were in any way separate and distinct. In their amended answer filed before the second trial, the unions again filed a joint answer by the same attorney, and for the first time denied that "at all times alleged in the amended complaint that the local union was an agent of the defendant international union." We note also that at all times the two unions have filed joint briefs prepared by the same counsel, evidently without thought as to the possible conflict of interest between the two parties by reason of the same representation.

Defendants additionally urge that although the finding of liability from the prior trial might stand, the jury on remand should still have been instructed to apportion the damage between the International and the Local. However, in view of (1) the basis of liability of the International as originally instructed upon by the district court, (2) the failure of the unions' counsel to object to this instruction, (3) the jury's finding that the International's liability was based on its authorization of the Local's conduct, and more significantly, (4) the unions' abandonment of these issues on the first appeal, we approve the district court's instruction at the second trial grouping the International and Local together for purposes of apportioning the damage between the employer and the unions.[6]

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[6]In the second trial the district court in instructing on the § 301 claim stated:

> "You are also instructed that the Court has already determined and you must accept as already established as a matter of law, that plaintiff's discharge from employment was wrongfully and unlawfully induced by the defendants Communications Workers of America, AFL-CIO and Local 7495, Communications Workers of America, AFL-CIO, because of plaintiff's non-membership in the defendant unions."

The court also instructed as to the apportionment of damages in part as follows:

> "On the other hand if you find that plaintiff's damages, if any, were contributed to by both the unlawful breach of contract by the defendant company, and the unlawful conduct of the defendant unions in inducing such breach, then you will apportion the damages between the defendant employer and the defendant unions according to the degree of fault of *each*, as called for by the special interrogatories to be submitted to you. The verdict you return, however, will reflect only the total amount of damages, if any, plaintiff has sustained on his first claim." (Our emphasis.)

Interrogatory No. 3 reads:

> "3. IF YOUR ANSWER TO INTERROGATORY NUMBER 1 IS 'YES' INDICATE THE PERCENTAGE OF THE RESPONSIBILITY FOR THE PLAINTIFF'S DISCHARGE THAT YOU FIND FROM THE EVIDENCE. (ON THE BASIS OF THEIR RESPECTIVE ROLES IN CAUSING IT), SHOULD BE APPORTIONED TO EACH DEFENDANT.
>
> A percentage for Western Electric and a percentage for the defendant unions.
>
> WESTERN ELECTRIC ..... %
> THE DEFENDANT UNIONS ..... %

This brings us to defendants' final claim that the damages were excessive. Richardson was awarded $92,000 as damages arising from his wrongful discharge. At the time of his discharge on September 1, 1966, he was 27 years of age. He had reached the highest grade which an hourly employee could hold (Grade 5) and was second in seniority among the 164 hourly rated shop and warehouse employees in the Omaha plant. By the time of the second trial, he had secured alternate employment as a village police officer and it was stipulated that his lost wages to date of trial were approximately $12,000.

In discussing the damage question under a § 301 claim, we observed in our prior opinion:

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6 (cont'd)

> (The percentage apportioned to either of the defendants may range from 0% to 100%, but the aggregate of the percentages apportioned must total 100%)."

On the mental suffering claim, the court instructed that the agents of the local union are at the same time agents of the national union when, as under the facts here, the local union is subject to the control of the national. No such instruction appears as to the first claim. In excepting to the instructions the unions' joint counsel simply stated:

> "Defendant unions except to the instruction lumping together the local and national or international union as one.
>
> "The defendant unions further except to the instruction which stated in substance that the agency of the international union or, as referred to by the Court, the national union, could be determined by the acts of the members of the local union."

It is obvious, we think, that the defendants' exception was directed to the actual instruction in the second claim. The claim for intentional discrimination , based on the unions' statutory duty of fair representation, involved only the unions, and was directed in this court's prior opinion to be tried as to both liability and damages, since neither had been determined. The trial court has now granted a new trial on this claim.

Whether the court erred in instructing as a matter of law on the liability of the International, or whether the court should have instructed, as it did in the original trial, that the International's liability is one of fact, is an issue involved in the discrimination claim and is not before us on this appeal. No objection was taken to the interrogatories; no different form of interrogatory was requested by the defendant unions. Under the circumstances, an alternate basis for denying the unions' belated claim is that it was not properly presented to the trial court. Rule 51 of the Federal Rules of Civil Procedure requires that objections to instructions be made before the jury retires. We have spoken many times as to the efficacy of such a rule. See, e.g., *Fulton v. Chicago, R.I. & P.R.R.*, No. 72-1344 (8th Cir. April 27, 1973); *Walther & Omaha Public Power Dist.*, 412 F.2d 1164 (8th Cir. 1969); *Continental Casualty Co. v. Jackson*, 400 F.2d 285 (8th Cir. 1968).

> "[A]n employee wrongfully discharged under a collective bargaining agreement, as exists here, suffers more than just the loss of a job itself. His damage must be appraised in terms of not only his wages, but the loss of seniority and the benefits which flow from it; he has thus lost his reasonable expectancy as to his continued employment. To measure this loss only to the expiration of an existing bargaining agreement fails to take into consideration the realities existing. It is true that this expectancy of continued employment might expire if the company goes out of business or if the collective bargaining agreement is not renewed with the union. . . . However, as these factors affect the employee's expectancy of work, in the present case they are even less contingent than the employee's possible contemplation of his own death or unforeseen disability. None of these considerations provide an automatic bar to a recovery for future wages beyond the termination of the bargaining agreement.
>
> "Federal jurisdiction under § 301 is more than a proving ground for breach of employment contracts; it is rather a statutory ground for suits brought to implement labor policy as suggested by the Labor Management Relations Act. . . . When an employee's expectancy of employment is challenged by invidious discrimination of the company or the union arising from his nonunion membership, the law should not react nigardly as to

> realization of his whole damage. As the Supreme Court has written, 'there are problems so vital to the implementation of federal labor policy that they will command a high degree of inventiveness from the courts,' " quoting *United Auto Workers v. Hoosier Cardinal Corp.*, 383 U.S. 696, 701 (1966). *Richardson v. Communications Workers*, 443 F.2d 974, 979 (8th Cir. 1971).

In the charge to the jury the trial court instructed the jury in accord with our directions.[7]

The trial court reviewed the charge of excessiveness on the § 301 claim on the unions' motion for new trial. It denied the same. The damages awarded cannot be reduced to any mathematical formula. In view of all of the diverse factors for jury consideration we cannot say that the trial court abused its discretion in finding the award was not excessive. See *Krall v. Crouch Brothers, Inc.*, 473 F.2d 717 (8th Cir. 1973); *Scoville*

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[7]The charge reads:

> "Elements of plaintiff's alleged damage include loss of direct wages, overtime pay, such fringe benefits as paid vacations, insurance benefits, pension and retirement, and seniority rights. In this regard you should determine the period of time for which plaintiff would likely have continued in the employ of the defendant Western Electric Company, Inc., in the absence of the unlawful discharge, and you should determine the value of the wages, overtime pay, and such fringe benefits as seniority rights, paid vacations, insurance benefits, pension and retirement benefits, which he could reasonably have expected to receive during such period of employment. From such total sum as you determine plaintiff would have received had he not been wrongfully discharged, you must deduct from such total sum the value of the compensation and fringe benefits which an individual with the plaintiff's earning capacity could reasonably be expected, in the exercise of due diligence, to receive from other available employment during the said period. Plaintiff's present employment is not necessarily such other available employment, but may be given consideration by you in making your determination.
>
> "Upon arriving at the net loss, if any, suffered by plaintiff as just described, you shall determine the amount of any such net loss suffered to date and the amount of any such net loss attributable to periods in the future. You shall reduce such

v. Missouri Pacific R.R., 458 F.2d 639 (8th Cir. 1972); *O'Brien v. Stover*, 443 F.2d 1013 (8th Cir. 1971); *Perry v. Bertsch*, 441 F.2d 939 (8th Cir. 1971).

Judgment affirmed.

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7 (cont'd)

future losses, if any, to their present value, as you will be more fully instructed later, but any net loss sustained by plaintiff to date are not to be reduced."

APPENDIX "D"

OPINION OF THE COURT BELOW
FILED: NOVEMBER 16, 1972
[469 F.2d 333 (8th Cir. 1972)]

In the United States Court of Appeals for the Eighth Circuit.

No. 72-1207

DALE C. RICHARDSON, Appellant, v. COMMUNICATIONS WORKERS OF AMERICA, ET AL., Appellees.

No. 72-1220

DALE C. RICHARDSON, Appellee, v. COMMUNICATIONS WORKERS OF AMERICA, ET AL., Appellants.

Submitted: November 14, 1972.

Appeals from the United States District Court for the District of Nebraska.

Before GIBSON and LAY, Circuit Judges, and DURFEE,* United States Court of Claims Judge.

PER CURIAM.

Plaintiff Dale C. Richardson filed an action for multiple claims against the Communications Workers of America, AFL-CIO, arising from his alleged wrongful discharge from employment with the Western Electric Company, Inc. In his first claim he sought damages against both the Union and his employer under § 301(a) of the Labor Management Relations Act, 1947. 29 U.S.C.A. § 185(a). In his second claim he sought damages for mental anguish arising from alleged invidious discrimination directed against him for failing to join the Union. These claims were tried together, and on remand from this court[1] plaintiff recovered substantial damages on both claims. The trial court entered judgment on the verdict on the first claim but granted a new trial as to the award of damages on the claim arising out of the alleged invidious discrimination by the Union. The Union alone appealed the damages for wrongful discharge whereas the plaintiff has attempted to appeal the awarding of the new trial on the second claim.

After full consideration the court finds that it lacks jurisdiction to review the matters before it. It has long been settled that the granting of a new trial is not an appealable order. 6A Moore, Federal Prictice & Procedure § 59.9[4], at 3853-3854 (1971). The granting of the new trial may be challenged on the abuse of discretion in an

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*Sitting by designation.

[1] See our prior holding in the same case. *Richardson v. Communications Workers of America*, 443 F.2d 974 (8 Cir. 1971).

appeal only from the final judgment. See *Gallon v. Lloyd-Thomas Co.*, 261 F.2d 26, 27-28 (8 Cir. 1958).

Upon entry of judgment in the first claim the trial court did not certify the order as appealable under Rule 54(b) of the Federal Rules of Civil Procedure. This rule reads as follows:

> "When more than one claim for relief is presented in an action . . . the court may direct the entry of a final judgment upon one or more but less than all of the claims *only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.* In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates less than all the claims shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims." (Empahsis ours.)

Inasmuch as the order granting the motion for new trial is not appealable it necessarily follows that all claims still rest in the trial court. Being without jurisdiction the appeal must be dismissed. See *Gallon v. Lloyd-Thomas Co., supra.*[2]

The appeals are dismissed.

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[2] As we stated in the *Gallon* case:

> "When the case is ripe for appeal, this court will entertain the second appeal on the record and briefs prepared for the first appeal, insofar as applicable." 261 F.2d at 28.

MEMORANDUM AND ORDER
FILED: FEBRUARY 29, 1972

[Re new trial on mental anguish issue and entry of judgment on wrongful termination of employment issue.]

In the United States District Court for the District of Nebraska.

DALE C. RICHARDSON, Plaintiff, vs. COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, et al., Defendants.

CIVIL 02673.

APPEARANCES:

For Plaintiff - Edward Fogarty, Esq.

For Defendant Unions - Robert O'Connor, Esq.

ROBINSON, Senior Judge.

THIS MATTER comes before the Court upon defendants' [Communications Workers of America, AFL-CIO and Communications Workers of America, AFL-CIO, Local 7495] for an order of remittitur by the plaintiff on both causes of action. The defendants further move that if the plaintiff refuses to remit that the defendants be granted a judgment notwithstanding the verdict or in the alternative be granted a new trial. [Filing No. 162].

The Court has fully considered the matter and given careful attention to all aspects and arguments of the pending motions. The parties have assisted with briefs and oral arguments.

The Court will first address the issue of the jury award of $250,000 damages against the defendant Unions for mental distress, anguish or humiliation. The Court cannot logically conceive that such a verdict could have been based on the evidence adduced during the pendency of the trial. The subject of mental suffering is by necessity an abstract subject and it cannot be expected that damages can be computed with mathematical certainty, and the Court would not interfere if it were not of the firm opinion that the jury disregarded the evidence or the rules of law and rendered its verdict as the result of passion, prejudice, mistake, or some other improper reason. The Court now has the benefit of the guidance of the opinion of *Richardson v. Communications Workers of America,* 443 F.2d 974, 983 [8th Cir. 1971] wherein it is stated:

> "The damage arising from invidious discrimination against an employee by reason of his non-union membership may often times be measured only in terms of the mental distress, anguish and humiliation caused him."

Thus it is clear that the amount of the recovery should be measured by the damage caused, and not as a measure to punish the defendants. Punitive damages of course are not permitted in Nebraska. See *Roose v. Perkins,* 9 Neb. 304, 2 N.W. 715 [1879]; *Boldt v. Budwig,* 19 Neb. 739, 28 N.W. 280 [1886].

Now in this action there was no showing that the plaintiff was an especially sensitive, susceptible person or that he was especially vulnerable to injuries in the nature of mental distress. No evidence was presented which would support a finding that the emotional state caused, if any, was of a

permanent and lasting nature, or that serious psychosomatic illnesses resulted. In short the evidence would only support a conclusion that the trauma caused, if any, was of a temporary duration. The Court is not concerned that the trauma shown to have been suffered, if any, was not genuine but only is concerned with the evidence as it relates to damages suffered. It is clear that the verdict was excessive and intended to punish the defendants or resulted from some other improper reason. Yet the Court does not view the facts such that it would be proper to sustain a motion for remittitur because there is no way to effectively separate the proper elements of damage from those attributed to improper reasons. Thus a new trial on the issue of mental distress, anguish, or humiliation will be ordered.

But as to the verdict returned on the cause of action for lost wages, benefits and seniority rights the Court is satisfied that the award, although generous, was supported by the evidence and was proper in all other respects. The defendant Unions' argument that the International Union and the Local Union should have been treated separately for the purpose of this trial is without merit. The activity complained of was of an overt nature and continuing over a period of six [6] months. Even under traditional agency principles there was no issue for the jury. Moreover throughout the opinion of *Richardson v. Communications Workers of America, supra,* the Local and the International were treated as one entity. See also *Vulcan Materials Co. v. United Steelworkers of America,* 430 F.2d 446 [5th Cir. 1970]. Accordingly,

IT IS ORDERED that a new trial shall be held on the cause of action for mental distress, anguish, or humiliation.

IT IS FURTHER ORDERED that the defendant Unions'

motion for a remittitur, judgment notwithstanding the verdict, or a new trial on the cause of action for lost wages, benefits, and seniority rights should be and is hereby overruled, and a judgment will be entered.

Dated this 29th day of February, 1972.

BY THE COURT:

RICHARD E. ROBINSON

Senior Judge, United States District Court.

APPENDIX "F"

OPINION OF THE COURT BELOW
FILED: JUNE 4, 1971
[443 F.2d 974 (1971)]

In the United States Court of Appeals for the Eighth Circuit.

No. 20,326

DALE C. RICHARDSON, Appellant, v. COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO; DISTRICT 7, COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO; LOCAL 7495, COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO; WESTERN ELECTRIC COMPANY, INC., Appellees.

No. 20,329

DALE C. RICHARDSON, Appellee, v. COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO; DISTRICT 7, COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO; LOCAL 7495, COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, Appellants.

No. 20,330

DALE C. RICHARDSON, Appellee v. WESTERN ELECTRIC COMPANY, INC., Appellant.

Before LAY, HEANEY and BRIGHT, Circuit Judges.

LAY, Circuit Judge.

This case brings to us issues of both liability and damages under § 301(a) of the Labor Management Relations Act, 1947. 29 U.S.C.A. § 185(a).[1] A jury returned a verdict of $20,000 in favor of Dale C. Richardson against both his former employer Western Electric Company, Inc. and the Communications Workers of America, AFL-CIO, its District 7 and its Local 7495 (hereafter Union) for breach of the existing collective bargaining agreement by reason of discrimination and wrongful discharge from employment. The complaint basically alleged violation of the collective bargaining contract wherein both the employer and the Union covenanted not to "discriminate, coerce or interfere with employees because of membership or nonmembership in the Union."[2] The trial court

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[1] Section 185(a) reads:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, amy be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

[2] The full clause of the contract reads:

reduced the verdict to $1,500 as the maximum recoverable due to the fact that the bargaining agreement "could have" terminated on March 20, 1967, some six and one-half months after the plaintiff's discharge.[3] On appeal the plaintiff alleges error in the trial court's (1) limitation of the damages to the life of the collective bargaining contract, and (2) refusal to allow evidence of mental anguish or to submit it to the jury as an element of damage. Defendant Western Electric cross-appeals from the denial of its motion for judgment notwithstanding the verdict. The Union contends on cross-appeal that the plaintiff's action should have been dismissed for failure to exhaust contractual remedies.

The plaintiff, Richardson, was originally employed in Minneapolis, Minnesota, by Western Electric on July 2, 1957. After transferring to Omaha, Nebraska, in 1962 he maintained his previous membership in the Communications Workers of America, AFL-CIO. At the time of his discharge on September 1, 1966, he had reached the highest grade which an hourly employee could hold (Grade 5) and was second in seniority among the 164 hourly rated shop and warehouse employees in the Omaha plant. In 1965, Richardson became concerned over possible misuse of union funds and, getting

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2 (cont'd)

"2. Neither the Company nor the Union or any of their agents shall in any manner discriminate, coerce or interfere with employees because of membership or non-membership in the Union. The Company shall not discriminate against any Representative of the Union because of any action taken in presenting grievances on behalf of such employees. Neither the Union nor the members, Representatives or Agents thereof shall intimidate or coerce any employee into membership or continuing membership therein."

[3] After discharge from Western Electric, plaintiff obtained employment as a police officer. It was stipulated between the parties that the maximum compensation lost by Richardson between discharge and expiration of the collective bargaining agreement was $1,500.

no satisfactory explanation, he and two others withdrew from union membership in January of 1966. The withdrawal of the three left 161 employees as members of the Local. The evidence is that thereafter Richardson and the other two continuously received harassment and abuse both within the plant and outside it. Demonstrations against Richardson occurred daily in which the entire employee force took part. The record shows that obscenities were repeatedly directed at Richardson and the other two men by officers, stewards, and members of the Union. On September 1, 1966, Richardson and another employee got into an altercation. Richardson was discharged for violation of company rules.[4] The evidence disclosed that, at a meeting with management, the Union had urged Richardson's discharge.

The court submitted special interrogatories to the jury which it answered as follows:

"QUESTION NUMBER ONE

"DO YOU FIND FROM A PREPONDERANCE OF THE EVIDENCE REGARDING THE UNION'S CONDUCT TOWARD THE PLAINTIFF, FROM THE TIME HE DISCONTINUED HIS UNION MEMBERSHIP, THAT THE UNION WOULD HAVE FAILED TO FAIRLY AND IN GOOD FAITH REPRESENT THE PLAINTIFF IN HIS GRIEVANCE THROUGH THE STEPS OF THE GRIEVANCE PROCEDURE, INCLUDING ARBITRATION, IF PLAINTIFF HAD REQUESTED THE UNION TO DO SO?

[ANSWER] "YES.

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[4] One Western Electric Supervisor recommended to plaintiff that he resign rather than be discharged so he could be hired at another Western Electric plant.

"[If your answer to question number one is no, you need not proceed further.]

"QUESTION NUMBER TWO

"DO YOU FIND FROM A PREPONDERANCE OF THE EVIDENCE THAT SECTION 25 OF THE COLLECTIVE BARGAINING AGREEMENT WHICH PROVIDES THAT, 'NEITHER THE COMPANY NOR THE UNION NOR ANY OF ITS AGENTS SHALL IN ANY MANNER DISCRIMINATE, COERCE, OR INTERFERE WITH EMPLOYEES BECAUSE OF . . . NON-MEMBERSHIP IN THE UNION . . . NEITHER THE UNION, NOR THE MEMBERS, REPRESENTATIVES OR AGENTS THEREOF SHALL INTIMIDATE OR COERCE ANY EMPLOYEE INTO MEMBERSHIP OR CONTINUING MEMBERSHIP THEREIN' WAS BREACHED IN REGARD TO THE PLAINTIFF BY:

[A] WESTERN ELECTRIC COMPANY, INCORPORATED
[ANSWER] "NO.

[B] COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO INTERNATIONAL LABOR ORGANIZATION
[ANSWER] "YES.

[C] COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO LOCAL 7495
[ANSWER] "YES.

"QUESTION NUMBER THREE

"DO YOU FIND FROM A PREPONDERANCE OF THE EVIDENCE THAT THE PLAINTIFF WAS WRONGFULLY DISCHARGED IN BREACH OF THE COLLECTIVE BARGAINING AGREEMENT BY THE DEFENDANT

WESTERN ELECTRIC COMPANY, INCORPORATED?
[ANSWER] "YES.

"QUESTION NUMBER FOUR

"IF SO, DO YOU FIND FROM A PREPONDERANCE OF THE EVIDENCE THAT THE WRONGFUL DISCHARGE WAS PROXIMATELY CAUSED BY ACTIONS OF:

[A] COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO AN INTERNATIONAL LABOR ORGANIZATION
[ANSWER] "YES

[B] COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO LOCAL 7495
[ANSWER] YES.

We pass first on plaintiff's claim against Western Electric.

It is now settled that an individual employee may, pursuant to § 301(a), litigate a claim for relief in federal court against an employer for wrongful discharge under a collective bargaining agreement. *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965); *Humphrey v. Moore*, 375 U.S. 335 (1964); *Smith v. Evening News Ass'n*, 371 U.S. 195 (1962). *Cf. Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957). Although the trial court recognized this right, it limited plaintiff's damages to the period of time from the date of discharge to the termination date of the collective bargaining agreement. Western Electric justifies such limitation in reliance, *inter alia*, on *Rentschler v. Missouri Pac. R.R.*, 126 Neb. 493, 506, 253 N.W. 694, 700 (1934), which reads: "The contract between the union and the railroad company was limited to just one year, and therefore expired at the end of a year, and plaintiff could only recover for that period . . . " Federal law,

however, controls substantive relief under § 301. *Textile Workers Union v. Lincoln Mills, supra* at 456-57. In *United Auto Workers v. Hoosier Cardinal Corp.*, 383 U.S. 696 (1966), the Supreme Court, discussing the applicable statute of limitations under Indiana law,[5] made it clear that a § 301 suit involves consideration of both the collective bargaining agreement and the hiring contract between the employee and employer. The Supreme Court observed:

> "Proof of the breach and of the measure of damages, however, both depend upon proof of the existence and duration of separate employment contracts between the employer and each of the aggrieved employees. Hence, this § 301 suit may fairly be characterized as one not exclusively based upon a written contract." *Id.* at 706.

Although the claim for wrongful discharge against the employer arises out of the bargaining agreement, it is equally clear that the terms of the agreement do not create the job and that no specific obligation to hire flows from it. As has been often recognized, the collective bargaining agreement is not an ordinary contract but rather, in a sense, agglomerates a variety of rights and methodology relating to the employer, the union, and the employees. *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578-81 (1960). *Cf. J. I. Case No. v. NLRB*, 321 U.S. 332, 334-35 (1944). The employment relationships which arise under it do not exist separate from it in a vacuum totally void of other relevant circumstances. The expiration date of a bargaining

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[5]Where no federal statute of limitation exists, the federal law is that the state law then applies, 383 U.S. at 703-704. *Cf. Sandobal v. Armour and Co.*, 429 F.2d 249 (8 Cir. 1970).

contract does not place the employee in jeopardy of losing his job at the termination of the agreement. In fact one of the very incentives to union representation is job security. The employee, the union which represents him, the company which employs him, each contemplate a "subsisting" contractual relationship for an indefinite period of time. Cox, The Legal Nature of Collective Bargaining Agreements, 57 Mich. L. Rev. 1 (1958). Note, 61 Column. L. Rev. 1363 (1961). This is particularly true in established industries where continual dealings with a recognized union foster renewals and renegotiations. Furthermore, the employee, the union and the company are placed on notice that even after the bargaining agreement terminates the rights and obligations of the parties continue under the umbrage of the National Labor Relations Act. The obligation of the parties to bargain for new contracts is written into law. 29 U.S.C.A. § 158(a)(5). The company cannot exercise unilateral action detrimental to fair bargaining. *NLRB v. Katz*, 369 U.S. 736 (1962). Certain rights flowing from seniority status may not be unilaterally changed without affording the union the opportunity to bargain. *Brotherhood of Locomotive Firemen and Enginemen v. Detroit & T.S.L. R.R.*, 421 F.2d 660 (6 Cir. 1970), *cert. denied*, 398 U.S. 927; *NLRB v. Cone Mills Corp.*, 373 F.2d 595 (4 Cir. 1967); *Industrial Union of Marine and Shipbuilding Workers v. NLRB*, 320 F.2d 615 (3 Cir. 1963), *cert. denied*, 375 U.S. 984 (1964). The collective bargaining agreement in addition recognizes seniority rights, which as here, affect vacation pay, severance pay, pension rights and the expectancy not to be laid off during slack periods of work. It has been recognized that many of these rights may survive

the termination of the agreement. See e.g. *Zdanok v. Glidden Co.*, 288 F.2d 99 (2 Cir. 1961), *aff'd* 370 U.S. 530 (1962); *cf. United Brick & Clay Workers v. United Mine Workers*, No. 20,475 (8 Cir., filed March 5, 1971).

The above discussion is germane for realization that an employee wrongfully discharged under a collective bargaining agreement, as exists here, suffers more than just the loss of a job itself. His damage must be appraised in terms of not only his wages, but the loss of seniority and the benefits which flow from it; he has thus lost his reasonable expectancy as to his continued employment. To measure this loss only to the expiration of an existing bargaining agreement fails to take into consideration the realities existing. It is true that this expectancy of continued employment might expire if the company goes out of business or if the collective bargaining agreement is not renewed with the union. But *cf. Local 127, United Shoe Workers v. Brooks Shoe Mfg. Co.*, 298 F.2d 277 (3 Cir. 1962); *Zdanok v. Glidden Co., supra.* However, as these factors affect the employee's expectancy of work, in the present case they are even less contingent than the employee's possible contemplation of his own death or unforeseen disability. None of these considerations provide an automatic bar to a recovery for future wages beyond the termination of the bargaining agreement.

Federal jurisdiction under § 301 is more than a proving ground for breach of employment contracts; it is rather a statutory ground for suits brought to implement labor policy as suggested by the Labor Management Relations Act. *Textile Workers Union v. Lincoln Mills, supra* at 456-57. When an employee's expectancy of employment is challenged by invidious discrimination of the company or the union arising

from his nonunion membership, the law should not react niggardly as to realization of his whole damage. As the Supreme Court has written, "there are problems so vital to the implementation of federal labor policy that they will command a high degree of inventiveness from the courts." *United Auto Workers v. Hoosier Cardinal Corp., supra* at 701. See also *Vaca v. Sipes*, 386 U.S. 171 (1967); *John Wiley & Sons v. Livingston*, 376 U.S. 543 (1964); *Textile Workers Union v. Lincoln Mills, supra; United Steelworkers v. Blaw-Knox Foundry & Mill. Mach. Inc.*, 319 F. Supp. 636, 640 (W.D. Pa. 1970); *Sidney Wanzer & Sons, Inc. v. Milk Drivers Union, Local 753*, 249 F. Supp. 664, 671 (N.D. Ill. 1966). In view of the character of work here involved, the time the plaintiff had been with the company, the strong likelihood of his future employment with the company, the probability of renewal of the collective bargaining agreement, the severance of seniority rights, we deem future damages extending beyond the date of any collective bargaining agreement recoverable under § 301. See *De Arroyo v. Sindicato de Trabajodores Packinghouse*, 425 F.2d 281 (1 Cir. 1970), *cert. denied*, 400 U.S. 877; *Thompson v. Brotherhood of Sleeping Car Porters*, 367 F.2d 489 (4 Cir. 1966), *cert. denied*, 386 U.S. 960 (1967); *Local 127, United Shoe Workers v. Brooks Shoe Mfg. Co., supra.* We thus conclude that it was error to limit plaintiff's damage by the expiration date of the collective bargaining agreement.

We move now to discussion as to the liability and damages against the Union.

The plaintiff pleaded and tried his case on the theory that the Union breached the collective bargaining agreement

as to the nondiscrimination clause. Assertion of the claim against the Union for breach of contract misconstrues the relationship between the parties to a collective bargaining agreement. The Union is signatory to the agreement on behalf of all the employees. It thus serves in the capacity of a fiduciary to the employees. See, generally Cox, *supra*, 57 Mich. L. Rev. at 21. In fact, the rights of the individual employees are the "major focus" of the bargaining contract with the company. *Smith v. Evening News Ass'n, supra* at 200. Breach of the agreement by the bargaining agent, which simultaneously conflicts with its role as a fiduciary to the employee, creates a claim for breach of trust of its statutory duty to give adequate representation and not for one arising out of the collective bargaining contract.[6] *Cf.* Restatement of Trusts § 192 (1935). The role of the union as a bargaining agent for all employees, including nonunion employees, is governed by the National Labor Relations Act and only incidentally by the bargaining contract with the company. *Conley v. Gibson*, 355 U.S. 41, 46 (1957). *Cf. Seay v. McDonnell Douglas Corp.*, 427 F.2d 996 (9 Cir.

[6] As the Supreme Court recognized in *Vaca v. Sipes*, 386 U.S. 171, 177 (1967):

> "It is now well established that, as the exclusive bargaining representative of the employees in Owens' bargaining unit, the Union had a statutory duty fairly to represent all of those employees both in its collective bargaining with Swift, see *Ford Motor Co. v. Huffman*, 345 U.S. 330; *Syres v. Oil Workers International Union*, 350 U.S. 892, and in its enforcement of the resulting collective bargaining agreement, see *Humphrey v. Moore*, 375 U.S. 335. The statutory duty of fair representation was developed over 20 years ago in a series of cases involving alleged racial discrimination by unions certified as exclusive bargaining representatives under the Railway Labor Act, see *Steele v. Louisville & N.R. Co.*, 323 U.S. 192; *Tunstall v. Brotherhood of Locomotive Firemen*, 323 U.S. 210, and was soon extended to unions certified under the N.L.R.A., see *Ford Motor Co. v. Huffman, supra. Under this doctrine the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty and to avoid arbitrary conduct. Humphrey v. Moore*, 375 U.S., at 342." (Emphasis ours.)

1970). Where union discrimination against a nonunion employee ensues, the employer may choose to enjoin the union and enforce the contract clause for the sake of industrial harmony under § 301. However, when the employee seeks individual relief arising from union discrimination he need only look to the statutory duty of the union to adequately represent him. The fact that the Union's duty not to discriminate arose from its statutory duty rather than, as pleaded, from the bargaining contract should not affect plaintiff's basic claim under § 301.[7] Whether the claim against the Union be described as one in tort (*De Arroyo v. Sindicato de Trabajadores Packinghouse, supra*) or simply as one resting on breach of trust under a statutory duty, it is clear that the action does not rest on strict principles of contract law. This fact places further emphasis on the error of restricting the damages for the wrongful discharge to the time span of the collective bargaining agreement.

The focal issue in a § 301 suit is the employer's noncompliance with the collective bargaining agreement and the union's complicity in that breach. Joinder of a union

[7] Compare this court's analysis of the pleadings in a complicated construction damage suit, *Peter Kiewit Sons' Co. v. Summit Constr. Co.*, 422 F.2d 242 (8 Cir. 1969), where we said:

> "Indeed, there are some old cases which condemned pleadings in which alternative or inconsistent allegations or theories were so intermingled that the court was unable to determine what the plaintiff was alleging. *Catanzaritti v. Bianco*, 25 F. Supp. 457 (M.D. Pa. 1938); see generally 2A J. Moore, Federal Practice, para. 8.33, at 1893 (1968 ed.) Nevertheless, though Summit's amended complaint is hardly simple, concise and direct, Summit's overlapping and duplicative allegations of breach of contract, intentional interference with a contractual relation, and quantum meruit for extra work were sufficiently clear and understandable that Kiewit was not prejudiced thereby. The number and variety of issues alone made for extensive pleadings in this case. Understandably, duplications of factual allegations ofttimes are necessary to place a series of claims in proper context." *Id.* at 271.

in a § 301 suit satisfies two basic purposes: (1) it facilitates proof in one action that the union has either refused to process this employee's grievance or that because of the union's arbitrary conduct it would have been futile to seek the union's assistance to process the grievance,[8] (*cf. Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965)); and (2) it allows a determination of the portion of damages, if any, that the union should bear. *Vaca v. Sipes*, 386 U.S. 171, 196-98 (1967).

A union's liability under § 301 is only incidentally premised on invidious discrimination directed against an employee. Bad faith of the union becomes essential proof to obviate the necessity of an employee exercising the grievance machinery before seeking court relief from the company. *Vaca v. Sipes, supra* at 185-86. Where the union's breach of duty involves only a failure to process an employee's grievance, its apportioned damage arising from the unrelated wrongful discharge is usually de minimus. *De Arroyo v. Sindicato de Trabajadores Packinghouse, supra. Cf. Waters v. Wisconsin Steel Workers of International Harvester Co.*, 427 F.2d 476, 491 (7 Cir. 1970), *cert. denied*, 400 U.S. 911. Under such circumstances, the employer is solely responsible for the damages flowing from the breach of contract. As the Supreme Court said in *Vaca:*

> "The governing principle, then, is to apportion liability between the employer and the union according to the damage caused by the fault of each. Thus,

[8]The jury found that the Union breached this duty by its affirmative answer in Interrogatory No. 1. This was clearly an issue of fact properly submitted to the jury. There is no merit to the Union's cross-appeal that plaintiff failed to exhaust his remedies under the collective bargaining agreement.

> damages attributable solely to the employer's breach of contract should not be charged to the union, but increases if any in those damages caused by the union's refusal to process the grievance should not be charged to the employer. In this case, even if the Union had breached its duty, all or almost all of Owens' damages would still be attributable to his allegedly wrongful discharge by Swift." 386 U.S. at 197-98.

However, under the above principles, where the union also wrongfully induces the discharge, it follows that its liability for damages may be apportioned to the extent that it is responsible for the whole of such damage. *Cf. Vaca v. Sipes, supra* at 197 n. 18; *Humphrey v. Moore*, 375 U.S. 335 (1964).

In the ordinary case where the union has defaulted in its responsibility to process an employee's grievance or has wrongfully induced a breach of the collective bargaining agreement by the employer, damages for mental anguish have generally been rejected,[9] but in any event would be slight compared to an employee's damage for loss of wages. We hold, at least in this instance, that the denial of damages for mental distress related to the breach of the collective bargaining agreement was proper.

However, the over-all claim asserted here goes beyond the mere failure of the Union to process the employee's grievance with the company. As discussed, we construe plaintiff's complaint, although inartistically drawn in terms of the Union's breach of the collective bargaining agreement,

[9]*De Arroyo v. Sindicato de Trabajadores Packinghouse, supra; St. Clair v. Teamsters Local 515*, 422 F.2d 128 (6 Cir. 1969); *Brady v. Trans World Airlines, Inc.*, 244 F. Supp. 820 (D. Del. 1965)

as one which basically challenges the Union's role as a fiduciary in failing to adequately represent the employee. The complaint alleges, and the evidence and jury findings demonstrate, three basic violations of that duty: (1) wrongfully inducing the company to discharge the employee; (2) bad faith in failing to process the plaintiff's grievance; and (3) invidious discrimination directed against the plaintiff by reason of his nonunion membership.

Apropos is the Fourth Circuit's observation in the first appeal of *Thompson v. Brotherhood of Sleeping Car Porters*, 316 F.2d 191, 197 (4 Cir. 1963):

> "[D]isparate treatment in representation cannot be tolerated when based on the disadvantaged individual's or group's non-membership in the statutory bargaining agent. Such disparity in treatment constitutes a conspicuous example of forbidding discrimination that is not necessarily related to race. Depending upon the facts, it may violate the bargaining agent's statutory duty of fair representation. A union has no more justification to discriminate injuriously in its representation on the ground of non-membership, or instability of membership, or even because of persistent and vocal complaints or other obnoxious behavior, than it has to discriminate on account of skin pigmentation. None of these circumstances is relevant to the fair and proper discharge of a union's duty to those it is empowered to represent and whose employment is governed by its binding agreements."

As stated in *Vaca*, the duty is breached when "a union's

conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." 386 U.S. at 190.

During the trial plaintiff's claim for mental anguish was dismissed without prejudice. The district court did so to permit that claim to be filed in state court.[10] The district court construed the claim for mental anguish as separately pleaded and as accompanying plaintiff's § 301 claim under ancilliary or pendent jurisdiction. The court stated it was dismissing the claim within its discretion to refuse to exercise pendent jurisdiction. The dismissal against the Union is challenged here.[11]

The claim against the Union for intentional discrimination, as discussed above, involves a federal right. *Vaca v. Sipes, supra* at 177; *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337 (1953); *Steele v. Louisville & N. R.R.*, 323 U.S. 192, 198-99 (1944). This claim, as we view it, is separate and distinct from the Union's responsibility for its apportioned damage with the employer under § 301(a). There is no procedural bar to asserting this claim along with plaintiff's suit under § 301(a). In fact, litigation of all concurrent claims in one lawsuit should be encouraged. *Cf. Desrosiers v. American Cyanamid Co.*, 377 F.2d 864, 871 (2 Cir. 1967). The damage arising from invidious discrimination against an

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[10] Although there may have been a cause of action against the Union (perhaps in terms of tortious interference with a contract) which could have been filed in state court, we express some concern over the duplicity of damage in that claim and the one alleged here under § 301.

[11] Plaintiff does not address himself to any dismissal of his claim for mental distress against the individual union members. Section 301(b) (29 U.S.C.A. § 185(b)) allows money damages to be recovered under the Act only from the union and not from the individual members. On retrial the claim for intentional discrimination should proceed only against the Union.

employee by reason of his nonunion membership may often times be measured only in terms of the mental distress, anguish and humiliation caused him. The evidence is that plaintiff was subject to malicious treatment for over six months before his discharge.[12]

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[12]Vile and derogatory signs estimated at 1,000 in number were posted around the plant referring to "scabs"; they were taped to concrete columns, onto machinery, on the walls, in the rest rooms, etc. and drawn on supply cartons. When plaintiff or one of the two other nonunion men would enter the shop a chant of "scab! scab! scab!" to the accompaniment of foot-stomping and hand-clapping, would be raised by "everybody." Company officials claimed they were helpless to intervene since a man might just be mouthing the words and the Union would protest any unwarranted discipline. On several occasions Richardson's car was blocked in the parking lot at quitting time by union members' (one of whom was the Local's president) "stalled" cars. In one such instance the nonunion car was surrounded by some thirty union members who, chanting, jeering, and gesturing at the nonunion occupants, invited them across the street where about fifteen others waited to fight. Union officials took part in many of the intended harassments.

While at work Richardson was constantly pelted by a rain of nuts, bolts, and screws thrown at him by other employees. Other methods of harassment included constant pushing and shoving, challenges to fight and threats of violence, burning Richardson with a cigarette, dropping a lighted cigarette down his back, calling his wife vulgar names and attributing to her unnatural sex acts, deflating his automobile tires, placing a beer bottle behind his tires, squeezing a tube of grease in his tool drawer, and padlocking his locker. Not long after he resigned from the Union, the tires of his car were slashed while it was parked at his home.

During the nearly seven months of his nonunion employment, union men involved Richardson in three separate fights. In May, an employee by the name of Reber entered Richardson's work area, and after calling his wife a whore asked him to sign a statement that he (Richardson) had challenged Reber to a fight. Richardson struck Reber three times. Both were suspended by the company, Richardson for three weeks, Reber for two weeks. The Union activated a half-day wildcat strike in sympathy for Reber and filed a grievance on his behalf; none was filed for Richardson. On August 31, a union member raced ahead of Richardson to a water fountain. Richardson felt that the man was provocatively dawdling, so he removed the man's hand from the button, moved him aside, and drank from the fountain. A member of the Union standing nearby rushed to the man's side and asked him if he was hurt, to which the man replied: "Yeah, yeah, my back hurts." The next day, September 1, one Korytowski, a union member, tried to provoke Richardson in the parking lot. He kicked Richardson who returned the blow and called the offender a bastard. Later that day the company discharged Richardson.

Company officials testified as to the presence of the signs around the plant, the chanting, and the hurling of small items at the nonunion men but claimed that they were helpless to do anything about it without direct evidence from one of the supervisors. The only company intervention was a letter of warning to the Union and several oral requests to the Local's officers to settle the matter. During a meeting in the plant manager's office, the firing of Richardson was urged by the Local's president, its vice-president, its treasurer and its representative. At another union-management meeting, "concurrent" with Richardson's September 1 discharge, the Union took the position that the discharge was accurate. The Union did not file a grievance on his behalf.

In measuring damage under federal law a federal court may look to both federal and state laws, "whichever better serves the policies expressed in the federal statutes." *Sullivan v. Little Huntingt Park, Inc.*, 396 U.S. 229, 240 (1969). Mental distress has long been recognized as an element of damage for intentional wrongs in the State of Nebraska. *Herbrick v. Samardick & Co.*, 169 Neb. 833, 101 N.W.2d 488 (1960); *Doescher v. Robinson*, 132 Neb. 299, 271 N.W. 784 (1937); *LaSalle Extension University v. Fogarty*, 126 Neb. 457, 253 N.W. 424 (1934); *Netusil v. Novak*, 120 Neb. 751, 235 N.W. 335 (1931); *Kurpgeweit v. Kirby*, 88 Neb. 72, 129 N.W. 177 (1910). Mental distress has generally been recognized to be compensible in instances arising from intentional wrongs including invasion of privacy and denial of civil rights. *Time Inc. v. Hill*, 385 U.S. 374, 385 n. 9 (1967); *Donovan v. Reinbold*, 433 F.2d 738, 743 (9 Cir. 1970); *Moore v. Greene*, 431 F.2d 584, 590-91 (9 Cir. 1970); *Rhoads v. Horvat*, 270 F. Supp. 307 (D. Colo. 1967); *Solomon v. Pennsylvania R.R.*, 96 F. Supp. 709, 712 (S.D. N.Y. 1951); *Massachusetts Commission against Discrimination v. Pranzaroli*, ... Mass. ..... , 256 N.E.2d 311 (1970); *Alcorn v. Anbro Engineering, Inc.*, 86 Cal. Rptr. 88, 468 P.2d 216 (1970); Duda, Damages for Mental Suffering in Discrimination Cases, 15 Cleve. Mar. L. Rev. 1 (1966).[13]

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[13]In two cases prior to the recognition of the right of an employee to seek relief under § 301 in federal court, the Supreme Court approved the right of an employee to collect damages for mental anguish under state law. In *Machinists v. Gonzales*, 356 U.S. 617 (1958), the employee had sued the union in state court for wrongful ouster from the union, seeking reinstatement and damages for lost wages and physical and mental suffering. The verdict was for the plaintiff. The union appealed contending that the action sued upon constituted an unfair labor practice and that, therefore, the sole remedy was a complaint to the National Labor Relations Board. The Court held that even though the Board was empowered to award back pay and order reinstatement it could not "mulct in damages for mental or physical suffering. And the possibility of partial relief from the Board does not, in

Although plaintiff's claim might have been asserted in state court, we feel it was error to assume that the claim against the Union was not a federal right and not within the jurisdiction of the federal court. Since the case is to be remanded for reconsideration of damages under § 301, we deem it appropriate that plaintiff amend his complaint to separately assert his claim against the Union for mental distress arising from the intentional discrimination.[14] *Cf. Abrams v. Carrier Corp.*, 434 F.2d 1234 (2 Cir. 1970).

This brings us to Western Electric's cross-appeal.

Western Electric asserts that the jury's answer to Interrogatory No. 2(A), i.e. that Western Electric did not breach the anti-discrimination clause of the contract, defeats

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13 (cont'd)

such a case as is here presented, deprive a party of available state remedies for all damages suffered." 356 U.S. at 621. The Court then distinguished the nature of the Board proceedings from those of the state court:

> " 'The state court proceedings deal with arbitrariness and misconduct vis-a-vis the individual union members and the union; the Board proceeding, looking principally to the nexus between union action and employer discrimination, examines the ouster from membership in entirely different terms.' Isaacson, Labor Relations Law: Federal versus State Jurisdiction, 42 A.B.A.J. 415, 483." 356 U.S. at 622-23.

In a strong dissent urging the exclusion of labor cases in any form from state jurisdiction for the sake of uniformity, Chief Justice Warren implied that the *Gonzales* opinion brought mental damages within the scope of federal labor policy:

> "The right of action for emotional disturbance, like the punitive recovery the plaintiff sought unsuccessfully in this case, is a particularly unwelcome addition to the scheme of federal remedies because of the random nature of any assessment of damages. Without a reliable gauge to which to relate their verdict, a jury may fix an amount in response to those 'local procedures and attitudes toward labor controversies' from which the *Garner* case sought to isolate national labor regulation. The prospect of such recoveries will inevitably exercise a regulatory effect on labor relations." *Id.* at 628.

See also *United Auto Workers v. Russell*, 356 U.S. 634, 641 (1958).

[14] Since this claim was not submitted to the jury the jury must pass anew on both liability and damages. The employer has been found innocent of violating the nondiscrimination clause of the contract and cannot in any way be responsible for this damage.

plaintiff's claim since this was the only breach of the contract alleged by the plaintiff. However, this overlooks that the jury found that Western Electric did wrongfully terminate Richardson's employment under the agreement. The trial court instructed:

> "That provision in the collective bargaining agreement did not permit the company or union to discriminate, coerce, or interfere with any employee because of his non-membership in the union or to coerce any employee into union membership and/or, in the alternative, that the collective bargaining agreement did not permit the discharge of an employee from his employment without a justified reason.
>
> "That the acts or omissions of a particular defendant severally or jointly amounted to a breach of the collective bargaining agreement in one or both of the above ways."

Western Electric pleaded that its discharge of plaintiff was pursuant to Article 33, Sections 2 and 2.2 of the collective bargaining agreement which in essence provide for termination on serious violation of the company rules. The jury's finding under Interrogatory No. 3 that Western Electric wrongfully discharged plaintiff, unquestionably found the company's defense pretextual. We find no inconsistency in the answers to the two interrogatories. The employer's discharge of Richardson, induced by the Union's disdain for a nonunion member, was violative of the bargaining agreement even though the company was not found to be guilty of violating the nondiscrimination clause. We find no merit in Western Electric's cross-appeal.

In summary, the cross-appeals of the Union and Western Electric are denied; we order a new trial limited solely to the damage issues as to the claim for relief under § 301. The jury is entitled to hear the evidence as to the Union's activity in inducing the plaintiff's wrongful discharge so that it may then apportion the damages between the company and the Union on the basis of their respective roles in causing the breach. See *Czosek v. O'Mara*, 397 U.S. 25 (1970); *Vaca v. Sipes, supra.* The damages should encompass all those elements which may have been contemplated by the parties to arise from the breach of the bargaining agreement as it affected plaintiff's employment with Western Electric. The award of damages should embrace future earnings and an evaluation of any seniority rights which plaintiff might have had and has now lost.

Plaintiff is to be given leave to plead against the Union, as a separate count, damages for mental distress for the alleged violation of its statutory duty to avoid intentional discrimination against him up to and including the time of his discharge.

Reversed and remanded.

SUPPLEMENTARY AFFIDAVIT OF DAN J. WHITESIDE IN SUPPORT OF THE PLAINTIFF'S MOTION FOR ATTORNEY FEE

[AUGUST 27, 1974]

In the United States District Court for the District of Nebraska.

DALE C. RICHARDSON, Plaintiff, vs. COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO; LOCAL 7495, COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, Defendants.

Civil No. 02673.

State of California)
County of Orange) ss.

Dan J. Whiteside, being first duly sworn, on his oath deposes and says that he is the attorney for the plaintiff, DALE C. RICHARDSON, that the facts set forth herein are true to affiant's best knowledge, that such facts show the details of the work, time and expenditures summarized in his earlier affidavit in support of plaintiff's motion for attorney fee, that the said hours shown represent present estimates of the time which was spent by affiant on each item of work shown, that the affiant believes that all of the work he has done has not been recollected and set forth herein, that the affiant thus believes that the hours shown herein represent less than the total hours actually expended, and that the expenditures shown represent direct outlays of funds in this case by attorneys representing or working on behalf

of plaintiff, except as such expenditures are shown as estimates. The hours shown do not purport to represent work done by any attorney but affiant, the work done by Mr. Fogarty and Mrs. Hakola having been shown by their separate affidavits on file herein. The expenditures shown herein do show all expenditures by all attorneys in this case.

Work Done Personally By Affiant

I. District court pleadings, motions, responses to motions, answers to interrogatories, including research, drafting, appearances, and travel time on appearances.

A. Before first trial:

	DESCRIPTION	HOURS
1.	Seven page complaint	28
	Preparation for 29 summonses	4
2.	One page response to union motion to strike	1
	Appearance and travel time	2
3.	Eleven page response to company motion to strike	44
4.	One page response to union motion to dismiss	1
5.	Two page response (objections) to company interrogatories	2
	Appearance and travel time	2
6.	One page motion for entry of final judgment	1
7.	Six page answer to company interrogatories	24

	DESCRIPTION	HOURS
8.	One page motion to strike portion of company answer	4
9.	One page withdrawal of motion for final judgment	1
10.	Answers to union interrogatories	8
11.	One page motion to reset plaintiff's deposition	1
12.	One page motion to compel union answer	1
13.	One page motion to strike portion of union answer	1
14.	Four page brief opposing union and members' motion to dismiss	16
15.	Three page letter to Court re *Vaca v. Sipes*	12
16.	One page request for admissions	1
		154

B. Before end of first trial and beginning of second trial:

	DESCRIPTION	HOURS
1.	Preparation for and appearance on union-company motions for new trial after first trial	9
2.	Two page motion to amend order granting new trial	2
3.	One page request for admissions by company	1
4.	One page request for admissions by company	1

	DESCRIPTION	HOURS
5.	Stipulation to wages lost between discharge and expiration of collective bargaining agreement, plus conferences between Court and counsel therein	6
6.	Amended complaint per Court of Appeals directions	10
		29

TOTAL HOURS ITEM I 183

II. Depositions, including preparation of plaintiff's witnesses for defense depositions, conferences and study of facts for taking depositions of adverse witnesses, travel time, preparation of deposition subpoenas and praecipes:

	DESCRIPTION	HOURS
1.	Coffelt deposition at Littleton, Colorado	5
	Notice and arrangements	5
	Travel time	7
2.	Lambert deposition	7
	Travel time	2
	Pre-deposition conference with witnesses	3
3.	Thompson deposition	5
	Travel time	2
	Conferences	2
4.	Richardson deposition	4
	Travel time	2

	DESCRIPTION	HOURS
	Conferences	2
5.	Harllee deposition	2
	Travel time	2
	Conferences	2
6.	Graves deposition	2
	Travel time	2
	Conferences	2
7.	Eide deposition	2
	Travel time	2
	Conferences	2
8.	Praecipes and subpoenas and arrangements for all depositions	8

TOTAL HOURS ITEM II 72

III. Trials, including pre-trial preparation, research, preparation of jury instructions and trial briefs, days in trial, work outside court during trials, and travel time:

	DESCRIPTION	HOURS
1.	Pre-trial conference with Clerk and counsel (1969)	1
	Travel time	2
2.	Preparation for trial beginning February 17, 1969, including preparation of requested jury instructions and trial brief	100
3.	Seven days of trial, February 17, 18, 19, 20, 21, 24, and 26, 1969, at five hours per day in court	35

	DESCRIPTION	HOURS
	Travel time	14
	Work outside court during trial, five hours per day	35
4.	Preparation for trial beginning September 7, 1971	80
5.	Seven days of trial, September 7, 9, 10, 13, 14, 15, and 16, 1971 (same breakdown as Item 3)	84
	Travel time to and from California residence	10
6.	Preparation for trial beginning June 3, 1974	48
7.	Five and one-half days of trial, June 3, 4, 5, 7, 10, and 11, plus preparation of argument on Sunday, June 9	
	Court time	66
	Preparation of argument	12
	Travel time to and from California residence	10
	TOTAL HOURS ITEM III	497

IV. **Proceedings in appellate courts:**

A. Before second trial:

	DESCRIPTION	HOURS
1.	Petition for writ of mandamus (1969)	12
2.	One page notice of appeal (1970)	1
3.	Preparation of appeal bond, obtain and file bond	4
4.	One page request for reporter's transcript	1
5.	Appellant's opening brief in 1970 appeal, 46 pages at six hours per page	276
	Appendix	2
6.	Appellant's reply brief, 20 pages at four hours per page	80
7.	Miscellaneous filings in and correspondence with Court of Appeals on first appeal	10

B. After second trial:

	DESCRIPTION	HOURS
1.	Petition for writ of mandamus	12
2.	Appellant's brief in 72-1207, 41 pages at four hours per page	164
	Appendix	2
3.	Brief of appellee, 72-1220, 20 pages at four hours per page	80
4.	Appearance November 14, 1972	1
	Travel time to St. Louis from California residence	10
	Conferences with co-counsel	5
5.	Petition for rehearing, ten pages at four hours per page	40
6.	Petition for writ of certiorari, 22 pages at five hours per page	110
	Appendices, 22 pages	22

	DESCRIPTION	HOURS
7.	Appearance September 10, 1973, plus travel time plus conferences (see Item 4)	16
8.	Miscellaneous filings in and correspondence with Court of Appeals	20
	TOTAL HOURS ITEM IV	868
V.	Miscellaneous personal conferences with client	100
VI.	Telephone time to co-counsel and client	100
VII.	Correspondence with client, co-counsel, and opposing counsel	100

VIII. Recapitulation of hours

Item I	183
Item II	72
Item III	497
Item IV	868
Item V, VI, and VII	300
TOTAL HOURS	1,920

Expenditures By Affiant And Co-Counsel

I.	District court fees:	
1.	Filing complaint	$ 15.00
2.	Docket fee for appeal	30.00

3.	File amended complaint	$ 3.50
4.	Denver, file Coffelt deposition praecipe	.50
5.	Second appeal docket fee, $30 less $5.50 refund	24.50
	TOTAL ITEM I	$ 73.50
II.	Marshal's fees:	
1.	Serve Coffelt deposition subpoena	8.68
2.	Farley and Eide deposition fees and mileage	12.00
3.	Serve Farley and Eide deposition subpoenas	8.80
4.	Witness fee and mileage, [illegible] K. Gordon (1969 trial)	2.24
5.	Thompson witness fee and mileage (1969 trial)	27.52
6.	Serve summonses	117.00
	TOTAL ITEM II	$176.24
III.	Typing:	
1.	Type drafts of opening brief on first appeal, Western Girl Joan Oliver	26.01 30.87 52.00
2.	Type 1971 trial brief and instructions, Joan Oliver	40.00
3.	Miscellaneous typing during 1971 trial, Marilyn Brooks	17.00
4.	Western Girl for Marilyn Brooks	15.75
5.	Drafts of 1972 briefs, Laurel McCarthy	75.00

6.	Draft of petition for certiorari, Laurel McCarthy	28.00
	TOTAL ITEM III	$284.63

IV. Photocopies:

1.	9-16-68, intracompany (Western Electric) memoramda	7.50
2.	8-5-71	4.50
3.	8-27-71	4.29
4.	9-30-71	6.63
5.	2-24-72	1.50
6.	3-18-72	1.50
7.	8-21-72	4.50
8.	12-26-72	7.00
9.	5-29-73	4.00
10.	Copies by Mr. Fogarty	129.54
	TOTAL ITEM IV	$170.96

Note re Item IV: Affiant inadvertently included $203.21 telephone expense by Mr. Fogarty in the total photocopy expense, first affidavit.

V. Supplies and equipment:

1.	Paper and supplies, 1971 trial	5.73
2.	Typewriter and table rent, 1971 trial	23.81
	TOTAL ITEM V	$ 29.54

VI. Depositions and copies:

1.	Coffelt	$181.00
2.	Richardson	46.80
3.	Lambert	94.80
4.	Harllee	61.60
5.	Thompson	59.20
6.	Eide and Graves	132.00
7.	Graves (before 1971 trial)	92.20
	TOTAL ITEM VI	$667.60

Note re Item VI: First affidavit figure for depositions and copies contained $136.50 paid to reporter for transcripts of portions of Eide's third trial testimony—there was an inadvertent duplication in that the same $136.50 was also contained in the figure for reporter's transcripts.

VII. Witness fees and mileage:

1.	Thompson, first trial	27.52
2.	Expert witness, first trial	400.00
3.	Expended by Mr. Fogarty	
	Second trial	144.20
	Third trial	242.00
	Economic study for second trial	70.00
	TOTAL ITEM VII	$883.72

Note re Item VII: First affidavit contained a $126 duplication in Mr. Fogarty's second trial

expenditures; my error, not his.

VIII. Court reporter fees:		
1.	Wilda Woodbury, report second trial voir dire and argument	$ 40.00
	TOTAL ITEM VIII	$ 40.00
IX. Appeal bonds:		
1.	After first trial	10.00
2.	After second trial (two years)	20.00
	TOTAL ITEM IX	$ 30.00
X. Reporter's transcripts:		
1.	First trial	588.00
2.	Eide testimony, third trial	136.50
	TOTAL ITEM X	$724.50
XI. Court of Appeals and Supreme Court fees:		
1.	Filing fee, 1970 appeal	25.00
2.	Filing fee, 1972 appeal	25.00
3.	Clerk, Eighth Circuit, 1-13-73	6.60
4.	Supreme Court, file petition for certiorari	100.00
	TOTAL ITEM XI	$156.60

XII. Printing for Court of Appeals and Supreme Court, including postage and air express for documents sent

such courts:

1.	Priesman Graphics, opening brief, reply brief, and appendix	$649.08
2.	Dean-Standefer, brief, 8-29-72	309.94
3.	Parker & Son, brief, 9-15-72	319.27
4.	Dean-Standefer, petition for rehearing	99.52
5.	Bor-Air, air delivery charge for request for stay of mandate (8th Circuit, November, 1972)	50.00
6.	Dean-Standefer, petition for certiorari	430.22
7.	REA Air Express, petition for certiorari	15.51
	TOTAL ITEM XII	$1,873.54
XIII. Estimated postal expense		100.00
	TOTAL ITEM XIII	$100.00
XIV. Travel, including lodging, meals, tips, and transportation:		
1.	To Denver and Littleton for Coffelt deposition	
	Union Pacific	31.28
	United Airlines	33.02
	Hotel, food, taxi	26.39
2.	To Omaha from California and return, 1971 trial	
	United Airlines	192.00
	Hilton Hotel	310.07
	Auto rental	86.68
	Outside meals, tips, cabs (estimate)	120.00

3.	To St. Louis from California and return, Eighth Circuit appearance 11-14-72	
	American Airlines	$228.00
	Stouffer's Riverfront Inn	24.61
	Cabs, meals, tips (estimate)	25.00
4.	To St. Louis from California and return, Eighth Circuit appearance 9-10-73	
	Air fare and miscellaneous expense	234.27
	Hotel and food (estimated; paid by co-counsel)	40.00
5.	To Omaha from California and return, 1974 trial	
	United Airlines	221.27
	Hilton Hotel	407.94
	Auto rental	38.86
	Outside meals, cabs, tips (estimate)	50.00
6.	Expended by co-counsel, Edith Hakola	
	Hotel room, St. Louis for appearances 3-9-72, 11-13-72, 9-9-73 (estimate)	75.00
	Food on above three trips (estimate)	40.00
	Air fare for above three trips	375.00
	TOTAL ITEM XIV	$2,559.39

XV. Long distance telephone calls:

This item is the total of affiant's monthly telephone bills for long distance calls attributable to the Rich-

ardson case, plus an estimated $200 expenditure by co-counsel Edith Hakola, plus $203.21. Calls before second trial have not been itemized by month.

1.	Prior to October, 1971	$145.43
2.	1971 calls after September	
	October	27.80
	December, and January, 1972	16.00
3.	1972 calls after January	
	February	18.00
	March	10.52
	April	41.55
	May	22.80
	June	12.00
	July	10.50
	August	6.70
	September	16.45
	October	4.90
	November	35.55
4.	1973 calls	
	January	26.50
	February	12.44
	March	12.00
	April	7.47
	July and August	10.85
	September	33.65
	October	25.21
	November	15.01
	December	24.46
5.	1974 calls	
	February	21.80
	March	15.55

	May, $14,58 plus $15.11	$ 29.69
	June	58.85
6.	Calls by Mr. Fogarty	238.43*
7.	Calls by Mrs. Hakola (estimate)	200.00**
	TOTAL ITEM XV	$1,100.11

*Most of Mr. Fogarty's calls were made after September, 1971.

**Mrs. Hakola's calls can all be considered to have been made after September, 1971.

XVI. Recapitulation of expenditures:

Item I	73.50
Item II	176.24
Item III	284.63
Item IV	170.96
Item V	29.54
Item VI	667.60
Item VII	883.72
Item VIII	40.00
Item IX	30.00
Item X	724.50
Item XI	156.60
Item XII	1,873.54
Item XIII	100.00
Item XIV	2,559.39
Item XV	1,100.11
TOTAL EXPENDITURES	$8,870.33

DAN J. WHITESIDE

Notarized August 27, 1974.
Served August 30, 1974.

EXCERPTS FROM REPORTER'S TRANSCRIPT THIRD TRIAL - JUNE 1974 THE COURT'S CHARGE TO THE JURY AND THE PLAINTIFF'S EXCEPTIONS TO THE CHARGE

* * *

[Page 511]

THE COURT: Members of the Jury, if my memory serves me correctly, it was just one week ago today this Jury was selected to try the issues in this case. At that time I had told you that the trial and lawsuit is serious business with the [Page 512] litigants, the law, and I'm sure if you didn't realize that before, surely you do now.

Lawyers have a hard time at best in the trial of any lawsuit. I think they have done a commendable job in trying this case.

Now that the evidence and the arguments of counsel have been made, it becomes my duty to inform you of the legal principles and considerations by which you are to be guided, to guide you in arriving at a proper verdict.

The trial of a lawsuit, unlike some of the movie versions, is, in essence a search for the truth in which my duty is to give advice to you of the law you must apply, the facts as you find them in this case. And when I have done that, then it will be your responsibility to deliberate, examine the exhibits carefully, weigh the evidence as it has come to you from this witness stand, and then return a verdict that will speak the truth of this case and do justice among the parties without reference to who the parties may be.

As I indicated before, the parties that are litigants to a

lawsuit should be as impersonal to you and to me as "A" is to "B".

[Page 513] Now, it is your duty as Jurors to follow the law as declared by the Court and to apply the rules of law so given to the facts as you find them given as the evidence in this case. I would suggest that you not single out any one instruction or item contained in my charge as stating the law, but consider the charges as a whole. And neither are you to be concerned with the wisdom of any rule of law stated by the Court. And regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base the verdict upon any other view of the law now given in this charge; just as it would be a violation of your sworn duty, as judges of the facts, to base a verdict upon anything but the evidence in this case.

Now, at this preliminary point, I feel that I may properly urge you to make a forthright effort to arrive at an agreement in your deliberations. A common understanding and accord between competent and intelligent persons ought, usually, to be possible. This suggestion, however, must not be construed by any Juror as an admonition to forsake or abandon an honest and understanding opinion held by him or her, purely for the purpose of [Page 514] achieving agreement.

The judgments never coerce an agreement by the Jury. But it is appropriate for me to point out that if and when, in the course of your deliberations, differences in viewpoint arise between your several members, the Jurors thus circumstanced should carefully examine, in an objective and cooperative spirit, the grounds of their respective opinions before assuming a final position of dissent or discord and disagreement.

Now, it is appropriate to define certain terms at this point which will recur from time to time in this Charge.

By "Preponderance of the Evidence" is meant the greater weight of the credible evidence. Now that is not necessarily determined by the greater number of witnesses testifying in relation to the facts and circumstances, but that amount of evidence which on the whole, when fully, thoroughly and impartially considered, makes the stronger impression on your mind and is more convincing as to its truth when weighed against the evidence in oppcsition thereto. If the evidence is equally balanced, a preponderance is not established.

The term "Proximate Cuase", proximate cause [Page 515] has been defined as an injury or damage. It is proximately caused by an act, or a failure to act, whenever it appears from the evidence in the case that the act or omission played a substantial part in bringing about the injury or damage; and that the injury or damage was either a direct result or a natural or probable consequence of the act or omission.

At this time I would like to explain some of the allegations and claims which the Plaintiff and Defendants have set forth in their respective Pleadings.

The Plaintiff, Dale C. Richardson, brings this action against the Communications Workers of America, AFL-CIO, an International labor organization, and Local 7495, Communications Workers of America, a Local labor organization with its principal offices in Nebraska

The Plaintiff contends that during a time in 1966 while he was an employee of the Western Electric Company, entitled to all of the benefits which such employees enjoyed

under a Collective Bargaining Agreement between his employer and the two Defendant Unions, that said Unions, by and through their members who were acting as their [Page 516] agents, harassed the Plaintiff by various forms of mental and physical abuse and damage to his personal property. He contends that such harassment was an intentional and invidious discrimination against him solely on the grounds of his non-membership in the Defendant Unions and that such harassment was intentional, deliberate and malicious and was calculated and aimed at causing Plaintiff mental distress, anguish and humiliation.

Plaintiff alleges that as a direct and proximate result of the aforesaid harassment, he did, in fact, suffer mental distress, anguish and humiliation, and has thereby been damaged, for which he seeks recovery from either or both of the Defendant Unions.

By way of answer to the Plaintiff's charges, both Unions deny that they have invidiously or intentionally discriminated against the Plaintiff because of his non-membership in their organizations. They further deny that any of the acts allegedly committed by the individuals resulting in the alleged harassment were authorized or ratified by the Defendant Unions or that any of such acts were committed by their respective agents. It is also denied by each of the Defendant Unions that [Page 517] there was any intent by them, or agents acting in their behalf, to cause Plaintiff mental distress, anguish and humiliation.

Furthermore, except for the allegations admitted by them, each Defendant denies each and every other allegation of the Plaintiff's Complaint.

You will understand, members of the Jury that the

foregoing summary constitutes only a brief analysis of the Pleadings filed by the Plaintiff and Defendants in this case and must not be taken or considered by you as any evidence in this case, except that any facts admitted by a party in his or its Pleadings may be considered by you as being established as against such party.

Now, ladies and gentlemen, before I instruct you as to the essential elements which the Plaintiff must prove by a preponderance of evidence if he is to recover in this action, you should be advised that in Nebraska any employee has the right to withdraw from any labor organization, if he so chooses and that such withdrawal does not affect his right to be treated in a fair and impartial manner by the Union.

Also, you should be advised that the Defendant [Page 518] Unions, as the sole bargaining agent for all employees within their bargaining group, had a statutory duty to fairly represent the Plaintiff in his relations with his employer.

You are instructed that before Plaintiff may recover on his claim against either or both of the Defendant Unions, he must prove the following four essential elements of his cause of action by a preponderance of the evidence:

He must prove by a preponderance of the evidence that those individual Union Officers, Stewards and members who allegedly engaged in the conduct complained of were at the time they engaged in said conduct acting within the scope of the authority conferred upon them by the Defendant, Local Union, or the Defendant, International Union, or both.

He must prove by a preponderance of the evidence that each Union engaged in invidious discrimination against the Plaintiff because of his non-membership in the Defendant Unions.

He must prove by a preponderance of evidence that he has suffered damages in the nature of mental distress, anguish and humiliation as a direct and proximate result of such discrimination.

And he must prove the amount of such damages, [Page 519] if any.

If the Plaintiff has established each and every one of the foregoing elements of his cause of action by a preponderance of the evidence, then the Plaintiff shall be entitled to recover as against either or both of the Defendants and your verdict shall be for the Plaintiff.

If the Plaintiff has failed to so establish each and every essential element of his cause, then your verdict shall be in favor of the Defendant, or Defendants against whom he has failed to so establish said elements.

I shall now explain each of the four essential elements of the Plaintiff's cause of action just enumerated to you in greater detail.

The first element of Plaintiff's claim requires him to prove that the individual Union Officers, Stewards and members who allegedly engaged in the conduct complained of by Plaintiff were, at the time they engaged in said conduct, acting within the scope of their authority with the Defendant Local Union, or the Defendant International Union, or both.

You are instructed that an unincorporated association such as the Defendant International [Page 520] Union, and its chartered Local unit, the Local Union, are each persons in the eyes of the law, but of course, neither of them can act other than through their officers or employees or Stewards or members or other agents. One on whose behalf an agent acts is known as a principal. An International Union can also act

through the agency of one of its chartered Locals or through the agency of the Officers, Stewards, or members of such a Local.

The law therefore holds an unincorporated association such as the Defendant International Union, and a chartered Local Union unit of such International Union, responsible for all of the acts of their respective Officers, employees, Stewards, members, or other agents, provided such acts are done within the scope of the authority of the agent, as would usually be true if done in the ordinary course of employment, or in the ordinary course of the business of the Defendant labor organizations, as the case may be.

Authority to act for a labor organization in a particular matter, or in some particular way or manner, may be inferred from the surrounding facts and circumstances shown by the evidence in [Page 521] the case. That is to say, authority to act for a Labor Union, like any other fact in issue in a civil case, need not be established by direct evidence, but may be established by indirect or circumstantial evidence. For example, authority to act may be implied from knowledge by the principal of an act of an agent within the scope of employment when combined with failure to attempt to prevent the repetition of the same act or similar acts.

Every act of every Officer or employee or Steward or member or other agent done on behalf of or in the same name of a labor organization, if done within the scope of such agent's expressed or implied authority, is in law the act of the labor organization itself.

Agency or authority to act may be conferred tacitly or by implication, as well as by an expressed grant. One who permits another to give the appearance of agency may

be held liable as a principal.

In determining whether the act of a Union member, Steward, or Officer was within the scope of his authority from the Union, you may consider whether such person took action which was concerted [Page 522] with or similar to action taken by other members, Stewards, or Officers, which action tended to promote such Union aims as membership; you may also consider whether such concerted or similar action, if any you find, was engaged in by a large or by a small number of such members, Stewards, or Officers; you may also consider the number of times on which concerted or similar action was engaged in and whether such concerted or similar action was or was not continued over any substantial period of time.

In determining whether a Union member, Steward or Officer acted with a view or intent to further the interest of the Union, no proof of intent or view is necessary when the act by its very nature tends to further a Union goal.

The Defendant International Union, Communications Workers of America, AFL-CIO, was at all times pertinent hereto, the exclusive bargaining agent, and, the law imposed a fiduciary duty upon such International Union to fairly represent Plaintiff in his employment relationship, regardless of his non-membership in the Union without discrimination because of his non-membership in the Union.

The fiduciary duty so imposed by law upon the [Page 523] International Union may be delegated to a Local Union, or to members, Officers, or Stewards of a Local Union, but the International Union must be held responsible and liable for any breach of such duty by such Local Union, its members, Officers, or Stewards, irrespective of any authorization

for or knowledge of such breach. In other words, responsibility for breach of a trust imposed by law cannot be avoided by delegation of authority to another. Responsibility of the International Union for a breach of such duty committed by a Local Union or its Officers, or Stewards, or members does not relieve the Local Union of the responsibility for such a breach committed by its agents.

If you find, under the principles of the law of agency heretofore explained to you, that the Local Union or its Officers, Stewards, or members acted in any respect as agents of the International Union, then you shall treat the International and the Local as one in that respect.

Officers of the Defendant Local are considered general agents of the Defendant Local. However, before the Defendant Local is liable for their actions, it is necessary that the actions of such [Page 524] Officers, either be within the scope of their authority as Officers, or though outside the scope of such authority, necessary to accomplish the purposes of Defendant Local and done with the intent to accomplish such purposes.

The Stewards of Defendant Local Union are not general agents of the Defendant Local Union. Unlike Officers, Stewards perform only limited functions for the Defendant Local. The Defendant Local is only liable for the actions of its Stewards when such Stewards are acting within the scope of their limited authority, or though outside the scope of such limited authority, their actions are necessary to accomplish the purposes of Defendant Local Union and are done with intent to accomplish such purposes, or where the Defendant Local Union specifically authorizes or later ratifies the actions of such Stewards.

The members of the Defendant Local Union are not agents of the Defendant Local Union. The actions of an individual member of the Defendant Local Union do not bind the Defendant Local Union unless the Defendant Local Union either authorized or ratified the acts in question.

A principal is not liable on the grounds of [Page 525] respondeat superior for harm caused by an agent acting wholly for his own purposes.

The second essential element which the Plaintiff must prove by a preponderance of evidence is that each Union engaged in invidious and intentional discrimination against the Plaintiff on account of his non-membership in the Defendant Unions.

Each of the Defendant Unions were under a legal duty, as the sole bargaining agents for the Plaintiff, to fairly represent him in his relations with his employer. As such, each Union had a duty to refrain from acting arbitrarily, discriminatorally or in bad faith as the bargaining agent for the Plaintiff.

If you find that the Plaintiff was harassed by agents of either or both of the Defendant Unions by acts of physical and mental abuse because of his non-membership in said Unions, such acts would amount to an intentional discrimination in violation of said Union's duty to the Plaintiff, and would constitute a basis for a finding of liability on the part of such Defendant Unions for the Plaintiff.

The third essential element which Plaintiff must prove by a preponderance of evidence is that [Page 526] he has suffered injury in the form of mental distress, anguish and humiliation which was proximately caused by the Unions' discrimination against the Plaintiff on account of his non-

Union membership.

You are instructed that injury for such mental anguish and himiliation are not necessarily based upon pecuniary or monetary loss, but rather arise from such emotions as fear, embarrassment, shame, humiliation, worry and anger that naturally flows from intentional misconduct calculated to arouse such emotions.

The existence and extent of mental distress, anguish and humiliation need not be proven by direct testimony. You may draw an inference from certain intentional misconduct that it provoked the emotions which would arise in a normal and reasonable person under similar circumstances.

The fourth and final essential element which the Plaintiff must prove before he may recover is the amount of damage suffered by him for such mental distress, anguish and humiliation.

Obviously, the monetary sum which will compensate a reasonable and ordinary man for mental distress, anguish and humiliation cannot be calculated with [Page 527] mathematical certainty. However, if you find that such damages were suffered by the Plaintiff, in this case, you shall award him such sum as will compensate him reasonably for such mental distress, anguish and humiliation.

You are instructed that it is the duty of any person who has suffered damages to use reasonable diligence and reasonable means under the circumstances in order to prevent the enhancement of such damages.

The burden is upon the Defendants to prove by a preponderance of the evidence that Plaintiff could have mitigated his damages, if any, and to prove by a preponderance

of the evidence the amount by which such damages, if any, could have been mitigated.

In determining whether a party to this action has sustained the burden of proof upon him or it, you are not limited to the evidence introduced by such party. Any party to the case is entitled to the benefit of any evidence tending to establish his or its contentions, even though such evidence comes from witnesses presented by the other party to the suit.

The credibility of the witnesses and the weight, [Page 528] if any, to be given their testimony are questions exclusively for you as the Jury to determine. In determining the weight to be given to the testimony of the several witnesses, you should take into consideration their interest in the result of the suit, if any such appears; their conduct and demeanor while testifying, their apparent fairness or bias; their relationship to the parties, if any such appears; their opportunities for seeing or knowing and remembering the things about which they testified; the reasonableness or unreasonableness of the testimony given by them; and all of the evidence and facts and circumstances proved tending to corroborate or contradict such evidence, if any such appear. You are not bound to take the testimony of any witness as true, and should not do so if you are satisfied from all the facts and circumstances proved on the trial that such witness is mistaken in the matter testified to by him, or that for any other reason appearing in the evidence his testimony is untrue or unreliable.

During the trial of this case, certain testimony has been read to you by way of deposition. The testimony of a witness who for some reason cannot [Page 529] be present to

testify on the witness stand is usually presented in writing under oath in the form of a deposition. Such testimony is entitled to the same consideration and, insofar as possible, is to be judged as to credibility and weighed by the jury in the same way as if the witness had been present.

In particular, you must not speculate or form or act upon any opinion as to how a witness might have testified in answer to questions which I have rejected upon the trial, or upon any subject matter into which I have forbidden inquiry.

In coming to any conclusion in this case, you must be governed by the evidence before you and by the evidence alone.

You have no right to indulge in speculation, conjecture, or inference not supported by the evidence. You will be careful not to confuse questions and answers which have been ruled out or not admitted with that which has been admitted and received in evidence. You must disregard all testimony ordered stricken from the record and any remarks of counsel in their opening statements, or during the progress of the trial, or in the arguments, not warranted by the evidence, if any [Page 530] such statements have been made. The evidence is what the witnesses were permitted to testify to on this witness stand, the exhibits which have been received in evidence, and the admissions, agreements and stipulations of the parties in open Court, and not what counsel or even the Court may have stated respecting the content of the evidence. Also, any facts admitted by a party in his or its Pleading may be considered by you as being established as against such party.

In accordance with the oath which each of you took

when you were selected as Jurors to try this case, it is your duty to determine the disputed issues of fact in this case from the evidence produced before you in the light of the instructons given you in this Charge, and seek thereby to reach a verdict which shall speak the truth of the case and thereby do justice between the parties hereto, uninfluenced by sympathy, favor, affection or prejudice for or against any party.

As I have already informed you, the law as given you in this Charge you are bound to receive and accept as correct, and none of you is privileged to entertain an opinion as to the law or what the law should be which conflicts in any [Page 531] respect with the law as stated by me in this Charge. However, I have not attempted to embody all the law applicable to this case in any one of the instructions contained in this Charge, and therefore, you must consider the Charge in its entirety, give due weight to each phase or item of it, and construe each phase or item of it in the light of and in harmony with each other of its phases or items, and so apply the principles enunciated to all of the evidence received upon the trial.

This case should be considered and decided by you as an action between persons of equal standing in the community, of equal worth, and holding the same or similar stations in life. A Corporation or Union organization is entitled to the same fair trial at your hands as a private individual. The law is no respector of persons; all persons, including Corporations and Unions, stand equal before the law and are to be dealt with as equals in a Court of Justice.

In the trial of this case and in this Charge, I have in no way attempted to express my opinion as to who should

prevail upon the issues submitted to you. You must not construe any statement, [Page 532] action, or ruling on my part in the trial of this case as an indication of any opinion on my part respecting the proper course of your verdict. During the course of a trial, I occasionally ask questions of a witness in order to bring out facts not been in my opinion fully covered in the testimony. Do not assume that I hold any opinion on the matters to which the questions related.

So regardless of what I may have chosen to say, I must admonish you that you are the sole judge of the facts, and your verdict must respond to your own conclusions from the evidence.

Now, members of the Jury, upon retirement to the Jury room—I see it's 4:20 now. Upon your retirement to your Jury room, you should first select one of your number as your foreman, and this may be done in any manner that you agree upon, who will sign your form of verdict. You will then proceed immediately with your study of, and deliberations upon the case.

In arriving at your verdict, I must admonish you it must be unanimous. Short of unanimity you cannot consider that you have reached any verdict. In this connection, however, again I may properly urge you to make a forthright effort to accomplish [Page 533] an agreement in your deliberations. Inconclusive trials are highly undesirable and as I indicated before, a common understanding among competent and intelligent people ought to be possible.

Now, the Jury is further admonished that a quotient verdict, that is to say, a verdict resulting from any agreement in advance of a vote that the verdict shall be the

average of the Juror's separate assessments of the damage, if any, sustained by the Plaintiff, is an illegal verdict and will have to be set aside by the Court. Therefore, you must abstain from any such procedure in arriving at a proper verdict upon due deliberation of this case.

Now, forms of verdict have been prepared, and will be taken by you when you retire for deliberations. These forms will be adequate for the expression of such verdict as you may properly agree upon.

Now, if it becomes necessary during the deliberations to communicate with the Court, you may send a note by the Marshal. Never attempt to communicate with the Court by any means other than a signed writing, and bear in mind, you are not to reveal to the Court or anyone else how the jury [Page 534] stands, numerically or otherwise, until you have reached a unanimous verdict.

Upon arriving at your verdict and completion by your foreman of a form of verdict, you will have completed your task and the foreman will notify the Marshal of that fact.

As Judge presiding over the trial, I shall be available in this building and will receive your verdict promptly upon its return.

Now, members of the Jury, if you do not arrive at your verdict within the period of the present Court day and it's obvious that you won't within that normal Court day, but in any event, you will continue your deliberations until you do arrive at a verdict, with due allowance of time for your meals and with any necessary intermission between 9:00 o'clock tonight and 9:00 o'clock tomorrow morning– 9:30 tomorrow morning.

During the time allowed for your meals and night rest,

you will be permitted to separate, returning promptly at the termination of the interval arranged for such purpose for the continuance of your deliberation.

And of course, I am sure I need not remind you, during your periods of such separation, you [Page 535] will carefully keep in mind and observe the admonitions which the Court has heretofore given you touching your conduct about separating.

Members of the Jury, I will now ask you to step into the Jury room while counsel has an opportunity to take such exceptions as they may want to take in this Court trial.

* * *

(Plaintiff's Exceptions to Instructions As Given By Court)

[Page 536]

The Plaintiff's exceptions to the giving of the Defendant's instructions that are No. 1, 5, 6, 7 and 8. Each states in the Plaintiff's opinion a too restrictive view of the law of agency. Also, I believe that the giving of those instructions might have created some confusion when considered in conjunction with those given at the request of the Plaintiff.

Particularly No. 8 states an erroneous statement of the law of agency as applicable to labor Unions. This approach of authorized or ratified–is contained in another section of one of the labor acts and a sub-section of Section 185, which is, of course, 301, specifically provided that that test authorization or ratification is no longer applicable. Now - -

THE COURT: Counsel agrees with that?

MR. LATHROP: No, Your Honor, I do not.

THE COURT: Very well.

Supreme Court, U. S.
FILED
JUN 7 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1671

DALE C. RICHARDSON,
Petitioner,

vs.

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,
and
LOCAL 7495, COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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JURISDICTION

The jurisdictional requisites are appropriately stated in the petition at pages 3-4.

OPINIONS BELOW

The opinions of the courts below are printed in the petitioner's appendix.

QUESTIONS PRESENTED FOR REVIEW

1. Where a party entitled to an award of attorney's fees fails adequately to substantiate the time which he expended upon the case, did the Court of Appeals err in holding that the trial court had not abused its discretion in allowing what it regarded as a reasonable fee given the character of the case?

2. Did the Court of Appeals err in holding that an instruction that a union member is not generally an agent of a union, and that therefore his acts are only chargeable to the union if they are authorized or ratified, when taken in the context of a group of instructions which also allowed findings of liability for acts of union members on other grounds, did not misstate the applicable law.

3. Did the Court of Appeals err in holding that the court had not abused its discretion in allowing a new trial on the grounds of excessiveness of verdict, where a $250,000.00 verdict was allowed solely for mental anguish unaccompanied by physical injury of any kind, the trial court regarded the verdict as so excessive that a reasonable remittitur could not be estimated, and the issues of liability and damage were so interwoven that a partial new trial on the damage issue only was not possible?

———o———

STATEMENT OF THE CASE

This suit was commenced by petitioner as an action by a former employee against his employer, the Western Electric Company, the International, which was the certi-

fied bargaining agent for employees in Western Electric establishments, such as that in which petitioner was employed, and the Local, which represented the Western Electric employees at the Omaha warehouse where petitioner had been employed. The suit was brought pursuant to Section 301 of the Labor Management Relations Act, 29 U. S. C. Section 185. In the original complaint, petitioner sued for breach of contract. He relied on a nondiscrimination clause contained in the collective bargaining agreement, and he sued his employer, the International, and the Local, as joint obligors under the nondiscrimination clause. He included in his complaint for breach of contract allegations with regard to the infliction of mental distress upon him. Because the suit was for breach of contract, the District Court limited damages for loss of employment to the term of the existing collective bargaining agreement. Since federal jurisdiction was bottomed on the claim for breach of contract and the ordinary contract rule is that damages for mental anguish are not allowed in contract, the District Court treated the claim for mental anguish as a pendant state law claim involving the tort of intentional infliction of mental distress. The District Court exercised its discretion to dismiss the pendant claim so that it could be filed in a state court.

At the first trial, the jury found separately as against both the International and the Local that each would not have fairly represented petitioner in a grievance procedure after his termination had he requested that they do so. The jury found separately as against the International and the Local that each had violated the contract

provision against discrimination against nonunion members, and that each had been a proximate cause of petitioner's discharge from his employment at Western Electric, which discharge was found to be wrongful. The jury awarded petitioner damages of $20,000.00 which were eventually limited by the trial court to $1,500.00 because of the expiration date of the collective bargaining agreement.

Petitioner appealed to the Eighth Circuit attacking both the limitation of damages to the term of the contract and the refusal to submit the mental distress damage issue. On appeal, that Court rejected the limitation of damages for wrongful discharge to the period of the collective bargaining agreement. With regard to the claim for damages for mental anguish, the Court noted that petitioner had erred in treating his claim against the Unions as a claim for breach of contract. The Court characterized the claim as analogous to a claim for breach of fiduciary duty, and held that damages for mental anguish could be allowed by analogy to parasitic recovery of damages for mental anguish in intentional tort cases. On the claim for damages for lost employment, the Court treated the liability of Western Electric and each Union as established and limited the retrial to the issue of the amount of damages and appropriate allocation among the parties. In addition, the Court authorized petitioner to file a second claim against the Union for mental distress. It directed that the mental anguish claim be submitted to the jury "on both liability and damages." *Richardson v. Communication Workers of America,* 443 F. 2d 974, 985 n. 14 (8th Cir. 1971).

Following on the reversal of judgment in the first case, Petitioner filed an amended complaint. The complaint stated two claims. The first claim against both the employer and the two Unions for wrongful discharge, and the second claim against only the two Unions for mental anguish. A second trial was held. On the first claim for the loss of employment the jury awarded petitioner $92,000.00, apportioned 30% to Western Electric and 70% to the two Unions, pursuant to the District Court's direction to treat the liability of the two Unions as joint. Upon petitioner's second claim, the jury awarded him $250,000.00.

After considering a motion for new trial made by both Unions, the District Court granted a new trial on the second claim because of excessive damage, but denied it on the first. A judgment was entered after the new trial order was overruled. The Unions appealed on the first claim, and petitioner appealed on the grant of the motion for new trial. Both orders were held to be nonfinal. *Richardson v. Communication Workers of America,* 469 F. 2d 333 (8th Cir. 1972).

On December 5, 1972, a Rule 54 (b) certificate was issued with regard to the first claim. On December 15, 1972, Petitioner filed a motion pursuant to Rule 52 (b) of the Federal Rules of Civil Procedure to modify the December 5, 1972 judgment to make allowances for attorney's fees. The December 5th judgment had allowed costs, but made no reference to attorney's fees.

On December 18, 1972, both Unions filed notices of appeal from the judgment of December 5, 1972.

Petitioner took no steps to have the appeal from the December 5, 1972 judgment dismissed because of the filing of the Rule 52 (b) motion. Rather, on March 15, 1973, he filed a motion requesting that the issue of attorney's fees be set aside until after a new trial on his second claim.

On December 26, 1973, the Court of Appeals affirmed the judgment for petitioner on his first claim. *Richardson v. Communication Workers of America,* 497 F. 2d 408 (8th Cir. 1973).

On January 24, 1974, a cashier's check was drawn on the National Savings and Trust Company of Washington, D. C. The check was made payable to Dale C. Richardson and Edward F. Fogarty, attorney. It was in the sum of $70,148.88, covering the judgment of December 5, and the costs allowed. Upon the back of such check appeared the following legend:

> "Settlement in full of judgment in Civil Action 02673, First Cause of Action, United States District Court for the District of Nebraska."

Petitioner and his attorney caused such check to be cashed. On January 31, 1974, the petitioner, through his attorney, filed a satisfaction of judgment and costs in the District Court.

A third trial was held limited to the mental anguish claim. At this trial it was undisputed that petitioner was treated to a considerable amount of hostile conduct by some of his fellow employees at Western Electric from the time he quit the local in January of 1966 until his termination by Western Electric in September of 1966.

Petitioner's theory of the case was that this conduct was engendered by the Local, and that the Local was acting as an agent for the International.

Each of the two Unions separately defended. The defense of the International was that it was not involved in any wrongdoing against petitioner. None of its officers were involved in any wrongdoing, the Local was not acting as agent of the International. The defense of the Local was based upon the theory that any acts against petitioner were acts of personal hostilty by individual members of the Local, and that the Local was not their principle when such acts took place.

Petitioner's claim for mental anguish involved conduct by a large number of individuals over a seven month period. In determining the amount of plaintiff's damages, it was necessary for the jury to determine as to particular acts of harrassment, whether the Local was liable for that act under principles of agency, and if so, whether the International was liable for such act of the Local under agency principles, before damages for distress caused by the incident could be awarded petitioner.

The questions of agency as to the International and the Local were submitted to the jury under a detailed charge concerning respondeat superior liability, authorization, ratification, and conspiracy. The jury found in favor of each defendant.

After the third trial but before entry of judgment, petitioner called up his motion for fees. The District Court awarded petitioner $10,000.00 in fees on his first claim upon which he had prevailed. The District Court did not award fees on the basis that this was a fund case.

Nor did the District Court award fees on the basis that the Unions were guilty of bad faith in litigating. Rather, the Court held that because of the bad faith involved in a breach of the duty of fair representation, an award of attorney's fees was justified.

Judgment was then entered for both Unions on petitioner's second claim and for petitioner on his fee award. Petitioner appealed to the Eighth Circuit attacking the judgment on the second claim and the amount of the fee award. The Unions cross-appealed claiming the case was not a proper case for an award of fees.

The Eighth Circuit affirmed in all respects.

———o———

ARGUMENT

Introduction

Each of the three matters upon which petitioner seeks review, the size of the fee allowed him, the jury instruction on agency, and the grant of the new trial, are matters peculiar to this case. None of the questions upon which petitioner seeks review are matters of general importance to the administration either of federal procedural law or of federal labor law. Thus, the Court of Appeals held that petitioner was not in a position to complain of the fee allowed his counsel, since counsel had not adequately documented his time. The Court of Appeals held that the one paragraph instruction on agency to which petitioner objected, when taken in the context of the nearly four pages of instruction on agency law given by the trial court, was not erroneous. The Court of Appeals, applying the usual standard that it may review a grant of new trial

for abuse of discretion, held that there was no abuse of discretion upon the facts of this case. In other words, all of the questions upon which petitioner seeks review are precisely the kinds of questions unique to an individual case, which the certiorari jurisdiction of this Court is designed to leave for final resolution at the Court of Appeals.

1. *Where petitioner's counsel failed to properly document his time, the Court of Appeals properly held that petitioner was in no position to complain of an allowance of fee upon the basis that it did not properly represent the value of services performed, when the time spent in performing those services had not been established.*[1]

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1 Petitioner challenges the failure of the trial court, firmed by the Court of Appeals, to allow him his expenses of litigation in addition to the attorney's fees. Plaintiff was allowed his costs on his first claim by the judgment. Costs were taxed by the clerk in the regular way. Plaintiff was allowed certain costs on appeal. Costs were taxed by the Clerk of the Court of Appeals in the regular way. No exception was taken to the costs taxed. Costs must be challenged within five days after they are taxed by the Clerk of the District Court, Federal Rules of Civil Procedure, Rule 54(d), and the allowable costs on appeal are specified in the Federal Rules of Appellate Procedure, Rule 39, and were allowed. Plaintiff did not attack the taxing of costs as required by Rule 54(d) and obtained all the costs to which he was entitled under Rule 39. The Court of Appeals held that his claim for additional costs and expenses came to late. In addition, plaintiff filed a Satisfaction of Judgment in the District Court on January 31, 1974, which included costs. While petitioner claims that his attorney's fees was not encompassed within the satisfaction, he never contended the costs and expenses were not covered by the satisfaction. Therefore, the claim that the District Court erred in not allowing such costs and expenses was clearly incorrect. The Court of Appeals so held. (Appendix p. 13.)

Petitioner's additional claim that costs should not have been taxed against him in the District Court after the third trial was never raised in the Court of Appeals. It obviously comes too late now.

In *Grunin v. International House of Pancakes,* 513 F. 2d 114, 127, 128 (8th Cir. 1975), the 8th Circuit held that counsel seeking a fee allowance had the burden of establishing the amount of time which he had devoted to the performance of the services for which he sought fees. Petitioner had prevailed on one claim but not on another. Under the District Court decision, he was entitled to a fee on the claim upon which he had prevailed, but not entitled to a fee for losing. However, petitioner's counsel submitted time affidavits, which did not allocate his time as between the two claims. While he now claims that the trial court could have performed this task, the burden was upon him to do so.[2]

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2 The time affidavits filed by petiitoner's counsel were the product of afterthought and estimation, rather than of accurate timekeeping. As an example, petitioner's counsel estimated that it took him 22 hours to assemble an appendix for a prior application for certiorari in this Court (Trans. 50-51). He estimated that it took him an hour to copy the form notice of appeal (Trans. 51). He estimated that all of his briefs required four hours per page to prepare. He did not keep time, rather he multiplied the number of pages in a brief by four to arrive at his research and writing time (Trans. 53). Counsel included in his time summary a large number of items which can only be described as frolics of his own. For example he listed fifteen hours for a trip to St. Louis on November 14, 1972. He went to St. Louis to make oral argument in an appeal, despite the fact that the Court of Appeals had issued an order stating that there would be no oral argument in the case. Plaintiff's counsel felt that it was his right, despite the Court of Appeals' order, to go to St. Louis and demand an opportunity for oral argument. Yet, he sought to charge the unions for this time. Petitioner's counsel sought a fee valued at $75.00 an hour. However, as of the time he withdrew from the private practice of law in Omaha, Nebraska, to become an employee of the State of California, petitioner's counsel had seldom charged more than $25.00 an hour (Trans. 47). A great part of the work involved in this case took place at a time when petitioner's counsel was charging $25.00 an hour. At that rate, the $10,000.00 fee would cover 400 hours. Given that petitioner's counsel did not keep accurate time

(Continued on next page)

It was not the District Court's burden to sift through these records and attempt to allocate time between the two claims. Since petitioner was entitled to a fee upon only one claim, and since his counsel had not properly allocated his time between the claim upon which petitioner was entitled a fee and the claim upon which he was not entitled to fees, the Court of Appeals properly held that he was not in a position to complain about the fee allowed.

2. *There was no error in the instruction upon agency given by the trial court.*

The trial court charged the jury that:

> "The members of the defendant local union are not agents of the defendant local union. The actions of an individual member of the defendant local union do not bind the defendant local union unless the defendant local union either authorized or ratified the acts in question." (Appendix p. 92.)

The petitioner contends that this instruction was erroneous. That contention is without foundation.

Section 301 (e) of the Labor Management Relations Act was intended to measure "the responsibility of a union for the acts of its members and officers . . . by reference to ordinary doctrines of agency." *United Mine Workers of America v. Gibbs,* 383 U. S. 715, 736 (1966). An individual member of a union is not an agent of the union. *United States v. White,* 322 U. S. 694, 702 (1944). As Senator Taft noted in his explanation of Section 301 (e):

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sheets, given that a method of estimating was used which in many instances produced totally exaggerated time estimates, given that petitioner's counsel made no effort to separate time between the first and second claim, the allowance of a $10,000.00 fee was clearly reasonable and not an abuse of discretion.

> "I think that the word 'agent' as used here, as used in the contract section, and as used in other places in the bill means an agent under the ordinary rules of agency, an agent of the labor union, the organization as such. The fact that a man was a member of a labor organization in my opinion would be no evidence whatever to show that he was an agent." 93 Cong. Rec. 4435 (1947).

In order to charge one person with liability for the acts of another person, not his agent, the one must become personally liable for the acts of the other by either authorizing those acts or by ratifying those acts. *Restatement Agency 2d,* Sec. 215, p. 466; *Restatement Agency 2d,* Sec. 218, p. 476; Seavey, *Agency,* Sec. 82, pp. 137-138. The same principles are applicable to a labor union. "The actions of one individual member no more bind the union than they bind another individual member *unless there is proof that the union authorized or ratified the acts in question. United States v. White,* supra, 322 U. S. 702. (Emphasis supplied.) Those principles were embodied in the trial court's charge.

Other instructions given by the trial court permitted the jury to find the unions liable for acts of members, if they had become agents of the union or had engaged in concerted activity with agents of the union. (Appendix 89-90.) As the Court of Appeals noted, "plaintiff's objections failed to take into consideration the instructions as a whole." (Appendix p. 9.) Taken as a group, the trial court's instructions constitute an accurate precise statement of the law of agency.

3. *The Court of Appeals properly found that there was no abuse of discretion by the trial court in the grant of the new trial.*

(a) The Eighth Circuit takes the view that the question of granting or not granting a new trial on the grounds of excessiveness of the verdict is primarily for the trial court. The circuit reviews the trial court's decision for abuse of discretion. *Solomon Dehydrating Company v. Guyton,* 294 F. 2d 439, 447, 448 (8th Cir. 1961); *Krall v. Crouch Brothers, Inc.,* 473 F. 2d 717, 718, 719, (8th Cir. 1973); *Snodgrass v. Nelson,* 503 F. 2d 94, 96 (8th Cir. 1974). The Eighth Circuit practice does not appear essentially dissimilar from the practice in other circuits. Wright, *Federal Courts,* 2d, Sec. 95, pp. 421-423; 6A Moore, *Federal Practice,* para. 59.08 (6), pp. 59-184, 59-191.

Petitioner attempts to create a conflict between the Eighth Circuit rule and the rule announced by the District of Columbia Circuit in *Taylor v. Washington Terminal Co.,* 409 F. 2d 145, 148-149 (1969). However, it is difficult to see what distinction the petitioner is attempting to draw between the practice of the two circuits. As the *Taylor* case makes clear, abuse of discretion can be found when the trial judge sets aside a verdict which is clearly not excessive. That is just another way of defining an abuse of discretion, a case where the trial judge treated as excessive a verdict which clearly was not. See, 11 Wright & Miller, *Federal Practice & Procedure,* Sec. 2820, p. 135.

Petitioner likewise finds conflict between the Eighth Circuit's usual practice and its decision in *Fireman's Fund Insurance Co. v. Aalco Wrecking Co.,* 466 F. 2d 179 (1972). The *Fireman's Fund* case dealt with review of a decision to grant a new trial on the grounds that the verdict was against the weight of the evidence. The Eighth Circuit

has regularly held that it has authority to review a decision granting or denying a new trial for abuse of discretion. *Altricher v. Shell Oil Co.*, 263 F. 2d 377, 380 (8th Cir. 1959); *Perry v. Bertsch*, 441 F. 2d 939, 943 (8th Cir. 1971). In *Fireman's Fund Insurance Co. v. Aalco Wrecking Co., Inc.*, supra, the Court found an abuse of discretion. *Fireman's Fund Insurance Co. v. Aalco Wrecking Co., Inc.*, supra, which dealt with review of a new trial on the grounds that the verdict was against the weight of the evidence, does not purport to announce any new or different standard to be applied in cases where the grant of the new trial is on the grounds of excessiveness of the verdict. Cf. *Richardson v. Communication Workers of America*, supra, 486 F. 2d 807, where the author of the *Fireman's Fund*, opinion applied the usual Eighth Circuit standard on excessiveness in a prior appeal in this case.

The verdict here is $250,000.00. The course of conduct involved allegedly began in February and terminated in September, a period of seven months. It consisted in the main of the use of vile, derogatory epithets, either verbally to petitioner or posted upon signs around his workplace. On several occasions, petitioner's car was blocked on the company parking lot. The physical violence against petitioner consisted of the throwing of nuts and bolts and screws at him. In addition, petitioner was involved in three fights.

Petitioner suffered no permanent physical injury as the result of these events. He suffered no temporary physical discomfort which can unambiguously be related to these events. He never required psychotherapy or chemical therapy for distress or depression.

Petitioner's only damage was mental anguish. The trial court could properly believe that a $250,000.00 verdict for mental anguish unaccompanied by any physical suffering or injury was excessive in the extreme.[3]

(b) Petitioner claims that a remittitur should have been ordered, rather than a new trial. However, the trial judge was of the view that the verdict might have been "the result of passion, prejudice, mistake or some other inappropriate reason." (Appendix 44.) In such circumstances a remittitur would not have been proper. *Minneapolis, St. Paul and Sault Ste. Marie Ry. v. Moquin*, 283 U. S. 520, 521 (1931). In addition, the trial judge regarded the verdict as so excessive that he could not separate out the proper from the improper elements therein. (Appendix 45.) The Court of Appeals reviewed the trial judge's decision to utilize a new trial rather than a remittitur and found no abuse of discretion.

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3 There were other grounds for the grant of the new trial, which Court of Appeals did not have to address since it affirmed it upon the grounds of excessiveness of the verdict. There was the matter of the improper Golden Rule argument, which petitioner's counsel concedes that he made, Brief p. 34, which would usually justify the grant of a new trial. **Chicago N. W. Ry. v. Kelly,** 84 F. 2d 569, 576 (8th Cir. 1936). At the trial involved in the current appeal, the trial court instructed the jury that agency between the Local and the International was a question of fact for them to determine. The Court of Appeals held that that instruction was proper (Appendix p. 9), and, thus, by inference, held that the instruction given at the second trial, that agency existed as a matter of law, was improper.

Petitioner's claim that the evidence on agency was overwhelming at the second trial is belied by the jury verdict at the third trial. In each case, the evidence was virtually identical. Nor, is petitioner's claim that the Unions did not contest the agency issue until the appeal in the third trial accurate. Exception was taken to the trial court's erroneous treatment of the agency issue at the second trial. See, **Richardson v. Communication Workers of America,** 486 F. 2d 801 Note 6.

(c) Petitioner argues that even if a new trial was proper, it should have been limited to the issue of damages. However, partial new trial in this case would not have been proper. Petitioner's claim for mental anguish involved conduct by a large number of individuals over a seven month period. In determining the amount of petitioner's damages, it was necessary for the jury to determine as to each particular act of harassment, whether the Local was liable for that act under agency principles, and if so, whether the International was liable for the acts of the Local interagency principles. While the jury in the second trial made a general finding of liability for mental distress, that finding would have been of no aid to a jury in a subsequent trial, since it would still be necessary to separately determine liability as to each individual act before allowing damages for the anguish which it might have caused. Where, as here, the issues of liability and the issue of damages are interwoven, a partial new trial is not permissible. *Gasoline Products Co. v. Champlin Refining Co.*, 283 U. S. 494, 500-501 (1931).

The Court of Appeals separately reviewed the trial judge's decisions on each of these matters, his decision to grant a new trial, his decision to deny remittitur, and his decision to make the new trial a total one, it found no abuse of discretion in any of these decisions. It's finding that the trial court did not abuse its discretion was clearly correct.[4]

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4 The Court of Appeals properly rejected petitioner's claim that the trial court had misunderstood the nature of the damages being sought (Appendix 4 n. 7). The trial court opinion makes clear that the court knew that physical injury was not required. Rather, the

(Continued on next page)

CONCLUSION

The Court of Appeals gave appropriate deference to the trial court's decision on the new trial issue and the allowance of fees but it did so only after careful review of those issues. The instruction complained of was clearly correct. There is no occasion for further review of this case.

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point which the court was making, in dealing with physical injury, was that the jury's verdict was in the range that would only be appropriate where emotional distress "of a permanent and lasting nature, or . . . serious psychomatic illness" was involved (App. 44-45). The trial court did not find that distress had not occurred. As the court stated, "the court is not concerned that the trauma shown to have been suffered, if any, was not genuine, but only is concerned with the evidence as it relates to damages suffered."